ILPD RESEARCH PAPER

Study of Alternatives to Imprisonment in Rwanda Focusing on the Mainstreaming of TIG ("Travaux d'Intérêts Général") and Best Practice Guidelines for Judges in the Exercise of their Discretion when Imposing Non-Custodial Sentences

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LIST OF ACRONYMS & ABBREVIATIONS

EAC	East African Community
FGC	Family group conference
GBV	Gender based violence
ILPD	Institute of Legal Practice and Development
JRLOS	Justice, Reconciliation, Law and Order Sector
KBA	Kigali Bar Association
MAJ	Maison d'Accès à la Justice
MINIJUST	Ministry of Justice
N/A	Not Applicable
RCS	Rwanda Correctional Services
RNP	Rwanda National Police
TIG	Travaux d'Intérêts General

FOREWORD

In a modern criminal justice system, imprisonment should be the last, not the first resort, of the sentencer. Research worldwide has established that imprisonment rarely serves the interests of rehabilitation, is expensive and is often a breeding ground for crime. Prison may be necessary to incapacitate a dangerous offender who is likely to commit further crimes or may legitimately be used to punish serious offences.

It is thus necessary to provide alternatives to imprisonment for criminals who do not fit into the last two categories above. Rwanda's new Penal Code has made great strides in introducing certain alternatives to prison and extending the use of TIG (Travaux d'Intérêts General). However, there is a need both for further alternatives and assistance with the use and application of those recently introduced. These are the focus of this research paper.

The original terms of reference for this study were drafted in 2009 before the Penal Code was enacted. With the agreement of the JRLOS steering committee, ILPD revised these terms of reference in the light of the new Penal Code. The revised terms of reference will be found at Appendix 1. The research methods used were structured interviews with samples drawn from all the main actors involved in sentencing and corrections as well as examination of the national laws, literature and comparative systems.

The research for and the writing of this policy paper have been carried out by ILPD under the direction of the Rector, Professor Nick Johnson. ILPD engaged two excellent consultants who conducted the research, Mrs Sophie Palombo and Mr Frank Mugisha. They were a joy to work with and I pay tribute to their effort, insight and attention to detail.

Professor Nick Johnson

Rector ILPD

STUDY OF ALTERNATIVES TO IMPRISONMENT IN RWANDA FOCUSING ON THE MAINSTREAMING OF TIG (TRAVAUX D'INTÉRÊTS GÉNÉRAL) AND BEST PRACTICE GUIDELINES FOR JUDGES IN THE EXERCISE OF THEIR DISCRETION WHEN IMPOSING NON-CUSTODIAL SENTENCES

EXECUTIVE SUMMARY

Alternatives to imprisonment serve to reduce pressures on the prison apparatus by reducing pre-trial detention and prison overcrowding. Furthermore, certain alternatives can be seen as having the long term benefit of reducing recidivism. There are various alternatives that can be used as a means to punish and rehabilitate offenders. Alternatives to imprisonment are most commonly used when dealing with first time offenders and minors.

Rwanda is at a key stage with regards to its use of alternatives to imprisonment, with Organic Law No. 01/2012/OL of 02/05/2012 instituting the penal code (the "Penal Code") recently extending the legislative framework so that community service or travaux d'intérêt générale ("TIG") is available to perpetrators of ordinary crimes. Other alternative sentencing options available for judges in Rwanda include fines and suspended sentences.

Prior to the new Penal Code, TIG was reserved solely for certain categories of genocide offenders[1]. This unique use of community service stemmed from Rwanda's troubled history of genocide. Community service was introduced as a home grown solution primarily to relieve prison overcrowding and to promote reconciliation and peace[2]. The Penal Code extended the sentence of TIG to all offenders who have committed an offence which is punishable by a term of imprisonment of up to 5 years[3].

It is against this backdrop that the Justice, Reconciliation, Law and Order Sector ("JRLOS") Steering Committee commissioned the Institute of Legal Practice and Development ("ILPD") to carry out a research project on alternatives to imprisonment in Rwanda with a focus on the mainstreaming of TIG to other crimes.

This project involved researching alternatives to imprisonment in neighbouring countries and further afield as well as analysing the legal basis for alternatives in Rwanda and how they work in practice.

Through the research it was discovered that although the Penal Code has gone some way to improving the sentencing options available to judges, it does not go far enough: it fails to address the under-utilization of non-custodial sentences; the high value of fines; the lack of sentencing

[1] Organic Law No 40/200 Of 26/01/2001 Creating "*Gacaca* Tribunals" And Organizing Prosecutions Of Offenses That Constitute The Crime Of Genocide Or Crimes Against Humanity Committed Between October 1, 1990 And December 31, 1994, arts.69 and 70. Organic Law N°16/2004 Establishing The Organisation, Competence And Functioning Of Gacaca Courts Charged With Prosecuting And Trying The Perpetrators Of The Crime Of, Genocide And Other, Crimes Against Humanity, Committed Between October 1, 1990 And December 31, 1994, arts. 73 and 78. organic law n° 13/2008 of 19/05/2008 amending organic law n° 16/2004 of 19/6/2004 establishing the organization, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994, art.20.

[2] National policy on the community service (TIG) as an alternative to imprisonment.

[3] Ibid, footnote 4, Article 47

information available to judges when sentencing; and other issues inherent in the TIG system. Further, the Penal Code does not sufficiently address the issue of alternatives to imprisonment for minors in conflict with the law, despite political willingness to introduce measures such as diversion schemes to divert children from the formal criminal justice system.

The following recommendations stem from the research and would serve to strengthen the underlying framework already in existence and benefit the criminal justice sector in Rwanda as a whole.

1. Introduce probation system for minors in Rwanda
    a. Rwanda does not currently have a probation scheme, widely used across the world and the East African Community, which would assist in decongesting prisons.
    b. A pilot probation scheme could be introduced in Karongi district.
    c. TIG co-ordinators at the sector level could also take on the role of probation officers following further training.
2. Introduce diversion schemes for minors
    a. Diversion schemes would assist in dealing with minors who have committed petty crimes to prevent them from being stigmatized and removed from their family environment.
    b. Diversion schemes are successfully used across the world and are in line with political will and traditional justice models available in Rwanda.
    c. District Justice Committees should be strengthened and their remit expanded to deal with child justice issues.
3. Develop neighbourhood TIG for non-genocide related offenders
    a. TIG should focus on reconciliation and rehabilitation and as such the punishment should be commensurate with the crime.
    b. Neighbourhood TIG, TIG carried out in the home area of the offender, is more proportionate for offenders of minor crimes whereas TIG carried out in camps is more appropriate for genocide perpetrators. Neighbourhood TIG would favour reconciliation between the victim and the offender due to their greater contact and the fact that victims witness first hand justice being done.
4. Increase the use of fines through a system of day fines
    a. Fines are currently under-utilized by judges as they are considered overly punitive.
    b. The introduction of a system of day fines would ensure that fines are proportionate and therefore would increase the incidence of fines.
5. Increase the use of suspended sentences
    a. Suspended sentences are rarely used and mostly reserved by judges for traffic offences.
    b. Training should be given to judges to encourage them to extend the use of suspended sentences. An offender should only be imprisoned where the interests of society deem it to be necessary.
6. Improve sentencing information available to judges for sentencing purposes
    a. Currently there is no mechanism for judges to receive sufficient information to assist them in exercising their discretion when sentencing offenders.

b. Sentencing information should be provided such as pre-sentence reports carried out by probation officers with the assistance of paralegals.
c. Pre-sentence reports should include a recommendation as to whether a non-custodial sentence would be appropriate.

7.	Improve document management and communication channels

a. Many *tigistes* have incomplete files (40% of tigistes at Nyanza's TIG camp) meaning that their rights are (potentially) being infringed upon.
b. It should be the responsibility of RCS/TIG department to make sure that before an offender begins their TIG sentence his/her file is complete.
c. Communication between the courts, police, prisons and RCS officials in charge of TIG should be strengthened to ensure that documents are well maintained and offenders are not "lost" within the system.

8.	Carry out legislative reform of both the Penal Code and the Presidential Order determining the modalities for implementation of TIG.

a. Legislative reform is required to put into effect the recommendations above.
b. The Penal Code should be revised to:
    i. Introduce probation orders
    ii. Introduce day –fines system
    iii. Remove requirement to serve half the sentence in prison where offenders are being sentenced to TIG.
c. The Presidential Order on the implementation of TIG also requires amendment to address the use of TIG in civil cases as well as other gaps.

9.	Introduce trainings on use of alternatives amongst police, prosecution, lawyers and judiciary.

a. In order for alternatives to be used effectively training sessions should be introduced to ensure that all the players within the criminal justice system are aware of the purpose of alternatives, the alternatives available and have the opportunity to see alternatives in practice.

INTRODUCTION

'Imprisonment has been shown to be counterproductive in the rehabilitation and reintegration of those charged with minor crimes, as well as for certain vulnerable populations."[4]

When examining alternatives to imprisonment, it is important to first evaluate the prison system and shortcomings of imprisonment as a sentence. Prisons are generally viewed as melting pots of criminal activity. First time offenders for minor crimes become acquainted with hardened criminals and the opportunities for rehabilitation are limited. It is therefore argued by many that prisons do not effectively address the issue of recidivism.

In Rwanda the total prison population stands at 56,730 (as at 30th September 2012) against a jail capacity of 54,000. Of the 56,730 inmates approximately 4,584 are detained on remand (awaiting trial)[5]. Although there has been much improvement in recent years, the number of inmates continues to overstretch and put pressure on the limited resources of the prison service. The prison population skyrocketed in July 2007 to approximately 98,000 due to Gacaca trials but the release program of Genocide offenders through TIG, resulted in a significant decongestion of prisons. Despite the release program, Rwanda's prisons are still operating at about 5.3%[6] over designed capacity, with resultant poor conditions for inmates.

Pre-colonial Rwanda did not have the penalty of imprisonment; but instead had traditional forms of punishment pronounced by the then traditional Gacaca which principally aimed at reconciling the parties to the dispute. These punishments included punishments such as carrying out unpaid work[7] for a specified period. Since the colonial period, however, and the import of prisons, this punishment as well as traditional Gacaca were repealed and replaced by modern courts and the punishment of imprisonment.[8] In the post-colonial period, the Gacaca courts and unpaid work, through TIG, as a punishment were reintroduced as measures to deal with the huge number of genocide offenders with the aim of reducing prison overcrowding, fostering national unity and reconciliation as well as contributing to national development[9]. Rwanda has a unique history and its use of community service for genocidaires was a unique use of an alternative to imprisonment.

Rwanda is at a key stage with regards to its use of alternatives to imprisonment. In line with Article 69 of the Rwandan Government's 7 Year Programme[10], the Penal Code recently extended the legislative framework so that community service or travaux d'intérêt générale ("TIG") is available to

[4]Handbook of basic principles and promising practices on Alternatives to Imprisonment, UNODC, 2007

[5] Rwanda Correctional Services (RCS), Activity report quarter I - 2012/2013

[6] Ibid, footnote 2.

[7] Note that this is equivalent to community service (TIG) under written law. Though the current presidential order (PO No.66/01 of 02/11/2012) doesn't define community service, article 2 of the 2005 presidential order defined community service as "***unpaid work*** of general interest carried out by a convict of the crime of genocide or any other crime against humanity…"

[8]Ubunyamabanga Nshingwabikorwa bwa Komite y'Igihugu y'Igihano Nsimburagifungo cy'imirimo ifitiye Igihugu Akamaro, *Imfashanyigisho ku Gihano Nsimburagifungo cy'Imirimo Ifitiye Igihugu Akamaro (TIG),* 2005, p. 38.

[9]National policy on the community service (TIG) as an alternative to imprisonment.

[10] Government Programme 2011 – 2017, published November 2011.

perpetrators of ordinary crimes. Prior to the new Penal Code, TIG was reserved solely for certain categories of genocide offenders[11]. This unique use of community service stemmed from Rwanda's troubled history of genocide. Community service was introduced as a home grown solution primarily to relieve prison overcrowding and to promote reconciliation and peace[12]. The Penal Code extended the sentence of TIG to all offenders who have committed an offence which is punishable by a term of imprisonment of up to 5 years[13].

The effect of the new Penal Code is to make TIG a sentencing option in the *classical* judicial system for the first time. Prior to the new Penal Code, TIG as a punishment was ordered by Gacaca courts which had a special legal framework. Gacaca courts' orders/decisions for TIG were made on the basis of a number of factors including confession, pleading guilty, repentance and asking for forgiveness by the offender[14].

The decision to make a convicted offender perform TIG is now in the hands of the courts as a sentencing option rather than an administrative decision taken while in jail. TIG is no longer an emergency response to an emergency situation (trying huge number of genocidaires). TIG must now evolve in this new context. Thus the justification underlying the initial introduction of TIG does not hold true in the context of minor offenders therefore the rationale for the TIG structure, for instance using TIG camps, needs to be re-addressed and reviewed. Judges need to understand and appreciate the underlying reasons for punishment and the role that TIG and other alternatives play in sentencing.

In 1997, 15 countries gathered in Kadoma, Zimbabwe for an international conference on community service orders hosted by PRI and Zimbabwe's National Committee on Community Service. At this conference it was stated that *'Community Service is in conformity with African traditions of dealing with offenders and with healing the damage caused by crime within the community. Furthermore, it*

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[11] Organic Law No 40/200 Of 26/01/2001 Creating "*Gacaca* Tribunals" And Organizing Prosecutions Of Offenses That Constitute The Crime Of Genocide Or Crimes Against Humanity Committed Between October 1, 1990 And December 31, 1994, arts.69 and 70. Organic Law N°16/2004 Establishing The Organisation, Competence And Functioning Of Gacaca Courts Charged With Prosecuting And Trying The Perpetrators Of The Crime Of, Genocide And Other, Crimes Against Humanity, Committed Between October 1, 1990 And December 31, 1994, arts. 73 and 78. organic law n° 13/2008 of 19/05/2008 amending organic law n° 16/2004 of 19/6/2004 establishing the organization, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994, art.20.

[12] National policy on the community service (TIG) as an alternative to imprisonment.

[13] Ibid, footnote 4, Article 47

[14] See articles 73 and 78 of Organic Law N° 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994. See also articles 14 and 16 of the Organic Law Nº 10/2007 of 01/03/2007 modifying and complementing Organic Law n°16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 as modified and complemented to date. See also art. 20 of Organic Law **Nº 13/2008 of 19/05/2008** modifying and complementing Organic Law n°16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 as modified and complemented to date.

is a positive and cost-effective measure to be preferred whenever possible to a sentence of imprisonment.'[15] This is also echoed by Archbishop Desmond Tutu who stated that *'[I]t's probably an African concept of our understanding of penology, what is the purpose? The purpose is ultimately the restoration of a harmony'*.[16] It is within this context that alternatives to Rwanda have to be examined in Rwanda.

There are various benefits to alternatives to imprisonment. In most cases they are much more cost effective, they use fewer resources such as manpower, and they can be seen to treat both victims and offenders more fairly.[17]

The cost of imprisonment is one of the main reasons that many countries have adopted a regime of alternatives to imprisonment as a practical solution. For example, in Europe, the cost of imprisoning one person for one year varies from 1,125 euros in Moldova to 70,000 euros in Norway.[18] In contrast the cost of alternatives is minimal. For instance in Canada it costs $52,953 a year to keep an offender in prison as against a cost of $10,951 per year for supervision in the community.[19] With regard to Africa, in Zimbabwe for example '*the monthly cost of supervising an offender on community service was estimated to be about one third of that of keeping a person in prison.*'[20] Imprisonment should therefore be reserved for the most serious crimes and for those who represent a serious danger to the public if released into the community so that governments can demonstrate that they are using their resources effectively.[21]

In Africa, severe overcrowding in prisons is a recurring feature. The reduction in prison overcrowding has therefore been the driving force for the introduction of alternatives. Overcrowding in prisons has an overwhelmingly negative impact on offenders[22] and leads to inhumane conditions for prisoners

[15]International Conference on Community Service Orders in Africa, held in Kadoma, Zimbabwe, from 24-28 November 1997, Kampala Declaration, paragraph 3

[16]Stern, Vivien, An Alternative Vision: Criminal Justice Developments In Non-Western Countries, Social Justice, Vol.28, No.3 (85), Law, Order and Neoliberalism (Fall 2001) pp. 88-104

[17] The Quaker Council for European Affairs, Investigating Alternatives to Imprisonment within Council of Europe Member States, February 2010, 27.

[18] The Quaker Council for European Affairs, Investigating Alternatives to Imprisonment Within Council of Europe Member States, February 2010, p. 7

[19]Satisfying justice: safe community options that attempt to repair harm from crime and reduce the use or length of imprisonment, The Church Council on Justice and Corrections, Co-published by the Correctional Service of Canada, July 1996

[20]Custodial and Non-Custodial Sentencing, Alternatives to Imprisonment, Criminal Justice Assessment Toolkit, UNODC, 2006, p.2

[21] Luka Muntingh, Human Rights in African Prisons, *Alternative Sentencing in Africa, Chapter 9,* HSRC Press, South Africa, 2008, www.hsrcpress.ac.za

[22] The Quaker Council for European Affairs, Investigating Alternatives to Imprisonment Within Council of Europe Member States, February 2010, p. 6

and spread of diseases.[23] The introduction of alternatives to imprisonment is important to resolve the issues, set out above, inherent in a criminal justice system that is overly reliant on prisons.

Governments have at their disposal a number of alternatives to imprisonment as a means to punish and rehabilitate those who commit crimes. The United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules)[24] sets out a list of alternatives to imprisonment:

'8. Sentencing dispositions

8.1 The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the ***rehabilitative needs of the offender****, the* ***protection of society*** *and the* ***interests of the victim****, who should be consulted whenever appropriate.*

8.2 Sentencing authorities may dispose of cases in the following ways:

(a) Verbal sanctions, such as admonition, reprimand and warning;

(b) Conditional discharge;

(c) Status penalties;

(d) Economic sanctions and monetary penalties, such as fines and day-fines;

(e) Confiscation or an expropriation order;

(f) Restitution to the victim or a compensation order;

(g) Suspended or deferred sentence;

(h) Probation and judicial supervision;

(i) A community service order;

(j) Referral to an attendance centre;

(k) House arrest;

(l) Any other mode of non-institutional treatment;

(m) Some combination of the measures listed above.'

In Rwanda the main alternatives available to judges are fines, suspended sentences and community service (TIG). The legislative framework is in place in Rwanda to facilitate the use of these non-custodial sentences; however the implementation and utilization of these alternatives needs attention in order to fully achieve their objectives. The 7-year Government Programme, under article 68, called for improvement in the implementation of TIG.[25] Beyond those alternatives available under Rwandan law, further cost effective alternatives should be introduced specifically to target minors in conflict with the law.

The increased use of alternatives to imprisonment in Rwanda and the recent expansion of community service to minor offenders are in line with both international norms as well as Rwanda's traditional approach to justice.

This report commissioned by the JRLOS Steering Committee, examines the alternatives currently available in Rwanda, and alternatives available internationally that could be introduced in Rwanda to strengthen the criminal justice system.

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[23] J. Sarkin, Prisons in Africa: An Evaluation from a Human Rights Perspective, International Human Rights Journal, Vol. 9, 22-49 (2009), p.8, '*some estimates from South Africa place the HIV infection rate amongst its prisoners at two times that of the general population.'*

[24] United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) adopted in 1990

[25] Government programme (2011-2017), published November 2011.

RECOMMENDATIONS

1. INTRODUCE A PILOT PROBATION SYSTEM IN RWANDA

There is no probation system set up currently in Rwanda. For the reasons set out below, the addition of probation specifically for minors would greatly strengthen Rwanda's justice sector.

1.1. Definition

Probation is included in the list of alternatives to imprisonment set out in The United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules)[26].

Probation can be defined as a sentence where the offender continues to live in their community; however is under the supervision of a judicial authority, probation service, or other similar body. Probation can involve requiring the offender to attend certain courses, therapy, counselling sessions or treatment programmes, or perform unpaid work in the community. Any breach of the terms of probation by an offender results in a return to prison therefore incentivising offenders to rehabilitate. Probation is used in countries all around the world.

1.2. Use of Probation around the world

Probation is widely used around the world, including by members of the East African Community (EAC).

Taking some of the EAC countries in turn:

COUNTRY	ADMINISTRATOR OF PROBATION SERVICE	NO. OF PROBATION OFFICERS	RESTRICTIONS ON PROBATION ORDERS	YEAR INTRODUCED
Uganda	Ministry of Gender, Labour and Social Development	Approx. 132 (one per district as per Probation Act 1963)	Probation orders can only be issued to children and are not available for adults	2000
Tanzania	Ministry of Home Affairs	160 (staff in the Probation and Community Service Department)[27]	Probation is for the most part used for offenders who are under 18, elderly or ill, whereas adults who are able to work tend to be recommended for community service orders.	2002
Kenya	Ministry of Home Affairs	605[28]	The offenders who are most likely to receive non-custodial sentences are first timers, old people, and women with children, the terminally ill and the mentally ill. A probation order can be between 6 months and 3 years.	Colonial period with the first probation officers in post in 1946

[26] United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) adopted in 1990, paragraph 8(h).

[27] Penal Reform International, Alternatives to Imprisonment in East Africa: Trends and Challenges, 2011

[28] Penal Reform International, Alternatives to Imprisonment in East Africa: Trends and Challenges, 2011

Further afield, in common law jurisdictions such as **England and Wales** and the **United States** probation was being used on an ad-hoc basis by the courts as early as the 1800s. This was a process whereby courts would suspend a sentence for certain types of offenders and place those offenders under the supervision of a guardian. This practice was enacted in legislation in the late 19th century. In the United States the practice of probation by the courts gained a legal basis as early as 1878.[29] In England and Wales, probation did not become an established practice of the English courts until the enactment of the 1907 Probation of Offenders Act. In this act the role of the probation officer was explained as one of '*advising, assisting and befriending the offender while monitoring, instructing and reporting*.'[30] More recently the Council of Europe published Recommendation CM/Rec(2010)1 to ensure greater harmony across European probation services.

> *'Considering that the aim of probation is to contribute to a **fair criminal justice process**, as well as to **public safety** by preventing and reducing the occurrence of offences;*
>
> *Considering that probation agencies are among the key agencies of justice and that their work has an impact on the **reduction of the prison population**.'*[31]

The above examples demonstrate the widespread use of probation which is not currently available in Rwanda.

1.3. Advantages and disadvantages of probation

1.3.1. Advantages

Rwanda is ready for a probation system. The idea has already received positive reinforcement amongst policy makers. For instance the draft 'Justice for Children Policy and Strategic Plan Development', published by the Rwandan Ministry of Gender and Family Promotion in January 2013 promotes the introduction of alternative schemes when dealing with minors and advocates for prison being a last resort[32]. The development of a probation system would serve to bring Rwanda's legal system in line with many neighbouring countries and other countries across the world.

Probation reduces the number of offenders receiving custodial sentences thereby reducing the burden on the prison apparatus. Further, there are cost savings in terms of feeding and housing prisoners and *tigistes*. The added cost of probation officers can be set off by this cost saving.

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[29] Ö, Sevdiren, Alternatives to Imprisonment in England and Wales, Germany and Turkey: A Comparative Study, 2011, p. 27, '*the state of Massachusetts passed a law empowering the mayor of Boston to appoint a paid probation officer with jurisdiction in Boston's criminal courts'.*

[30] Ö, Sevdiren, Alternatives to Imprisonment in England and Wales, Germany and Turkey: A Comparative Study, 2011, p.27

[31] Recommendation CM/Rec(2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules (Adopted by the Committee of Ministers on 20 January 2010 at the 1075th meeting of the Ministers' Deputies).

[32] Justice for Children Policy and Strategic Plan Development, Rwandan Ministry of Gender and Family Promotion, January 2013, Para 2.4.6

A further, longer term cost saving, is that the incidence of re-offending amongst those offenders who are integrated into society while on probation is much lower.[33]

Another advantage of a probation service for Rwanda is that it would be able to supervise those on probation as well as have a role in supervising those offenders carrying out neighbourhood TIG. Streamlining these two processes into one system, as is seen in many countries, would reduce the administrative burden of introducing a new standalone probation service.

Further, in most countries with a functioning probation system, that system is responsible for providing social inquiry reports and pre-sentence reports to the court[34]. These reports provide background on the defendant which can assist the judge in the sentencing process[35]. Such a role will be discussed in more detail in paragraph 6.2.2.

1.3.2. Disadvantages

The main disadvantage of probation is the cost. The development of a probation service requires a strong infrastructure which involves a large upfront expenditure. This expenditure includes the hiring and training of staff consisting of administrative, management and probation officers. Resources also need to be provided to those probation officers supervising numerous offenders to facilitate their travel and communication needs. A further disadvantage is that the introduction of a probation system may result in an increased number of court hearings if a person is to be sent to prison as a result of a "final" breach pursuant to an order made by a Judge (see paragraph 3.4)

One way to combat the cost of a probation scheme is to use well trained volunteers to work as probation officers under the supervision of professional probation officers. Most European countries still use a certain number of volunteer probation officers. Probation in Europe was originally staffed solely by individual volunteers and charitable volunteers. In Norway, probation work was the realm of volunteers until as late as 1980[36]. Nowadays volunteers play a lesser role as probation has become professionalized. Japan still uses a large number of volunteer probation officers to assist its probation services. These volunteers outnumber professionals by a ratio of 5:1.[37] These examples demonstrate that the use of volunteers can help to resolve staff shortages for a resource intensive probation system. Another way that this cost could be minimized would be to build upon the RCS framework already in place, this is discussed further below.

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[33] Penal Reform International, Monitoring and Research Report on the Gacaca, Community Service (TIG), Areas of reflection, March 2007

[34] Anton M. van Kalmthout, Ioan Durnescu, Probation in Europe, Chapter 1, European Probation Service Systems, A Comparative Review, European Organization for Probation, November 2008, p.21, table 1, all probation systems in Europe with the exception of Austria, Estonia, Moldova and Lithuania provide social enquiry or pre-sentence reports.

[35] Handbook of basic principles and promising practices on Alternatives to Imprisonment, UNODC, 2007

[36] Anton M. van Kalmthout, Ioan Durnescu, Probation in Europe, Chapter 1, European Probation Service Systems, A Comparative Review, European Organization for Probation, November 2008, p.10 http://www.cepprobation.org/uploaded_files/1_Chapter_1_Comparative_overview.pdf

[37] Penal Reform International, Alternatives to Imprisonment in East Africa: Trends and Challenges, 2011

1.4. How it could be implemented in Rwanda

Given that Rwanda does not currently have a probation system. A pilot probation scheme for minors focussing on supervision in the community would be the first step.

Upon successful implementation of the pilot phase, probation could be rolled out across the country and legislative reform carried out to pave the way. The penal code would have to include probation orders as a new sentencing provision available for judges[38]. The discretion of judges in sentencing offenders to probation would have to be set out in law or in sentencing guidelines. The main factors for consideration would be whether the offender is a first time offender and the nature and seriousness of the crime. This alternative should only be available for first time offenders who have committed a crime punishable by a short prison term[39]. Uganda's probation system only operates for minors, which could be reflected in Rwanda. This will assist to divert minors from prisons and aid their rehabilitation as they will not be taken away from their family and excluded from society. The use of probation has to be closely monitored to ensure that only those offenders suitable for probation, such as those who have a fixed abode or are first time offenders, can receive a probation order.

Minors would be chosen for the pilot scheme after consideration of the following factors (amongst others):

a. First time offender;
b. Length of prison term is below the maximum to be considered for probation;
c. Circumstances of the offence;
d. Fixed abode;
e. Character of the offender; and
f. Willingness of offender.

The social workers, part of the National Children's Commission, working at the district level would oversee, together with the district officer in charge of gender, family promotion and child's rights, the probation officers and probation in that district.

Probation officers would need to be recruited and trained on supervising offenders on probation. A certain number of probation officers would be necessary in each district, eventually with probation officer(s) in each sector as the programme expands.

In order to maximise efficiency, the probation officers could also be responsible for neighbourhood *tigistes* in their sector as well as offenders on probation. Each probation officer would need sufficient resources to allow them to conduct the necessary supervision. Follow up of these offenders would include regular one-on-one meetings, group counselling sessions to aid rehabilitation and inform the offenders of their future career options and other necessary supervision. The aim of this probation service would be to get the minors back on the correct path and away from a life of crime.

[38] Penal Code, Article 31.
[39] The exact length of the prison term should be decided by the Ministry of Justice in consultation with the judiciary.

Karongi district which only has neighbourhood TIG could be used as the location for the pilot probation scheme. Karongi has site managers in each sector that manage community service sites for the few days a week that neighbourhood TIG is taking place. These site managers could be trained to become probation officers and on the days that they are not managing community service sites they can be available for counselling sessions and supervision of offenders on probation. This would reduce the fiscal burden of hiring a large number of new probation officers; however the salaries of the site managers, currently at only RWF 20,000 per month[40] would have to be increased to motivate them and minimize incidences of corruption.

The below table sets out the costing for a pilot probation scheme to be set up in Karongi district:

PILOT PROBATION SCHEME – KARONGI DISTRICT

ITEM	UNITS	DESCRIPTION	COST (RWF)[41]
1. Train judges and prosecutors on probation orders	13 judges 12 prosecutors	Two week training course on probation orders	20, 000, 000
2. Train NCC social workers[42], District officer in charge of gender and family promotion and RCS co-ordinator	4	Two week training course on supervising probation	4, 500, 000
3. Train TIG supervisors from each sector to be probation officers	12[43]	Two week training course on supervising offenders on probation	10, 000, 000
4. Increased salary for TIG supervisors/probation officers	12	Currently earn 20,000RWF/month (not including transport and communication for which they do not currently receive an allowance), propose raising this to 80,000RWF/month to include transport and communication allowance	11, 520, 000 per year
5. Registers/stationary for TIG supervisors/probation officers	12	Standard equipment needed by probation officers to record meetings with probation offenders and their progress.	500, 000 per year
TOTAL			**46 520 000**

The training for judges, set out in the table above, should become part of their continuous training/education programme provided by the Supreme Court/Higher Judicial Training Council. The NPPA and KBA should do the same for prosecutors and lawyers to ensure that sentencing options

[40] Interview with neighbourhood TIG site supervisor in Karongi district, 14 December 2012
[41] See Appendix 5 for detailed breakdown of each cost.
[42] These will be introduced in Karongi district in the 2014-2015 financial year.
[43] There are 13 sectors in Karongi, however two sectors are covered with the same supervisor.

including probation becomes an integral part of their continuous professional development. The District Justice Committees should also be strengthened and their remit expanded to deal with child justice issues.

The pilot scheme will be closely monitored with extensive files maintained by probation officers on all offenders carrying out probation. These files will assist in identifying the successes of the schemes. Re-arrest and reconviction rates amongst these offenders should also be closely monitored. These figures can then be easily compared with figures for similar offenders sentenced to a term of imprisonment matching that of the offender who received probation. These quantitative statistics will enable policymakers to decide whether the scheme should be rolled out across the country.

1.5. Conclusion

'It is yet to become a reality that deprivation of liberty for the child should be a last resort, for the minimum period possible'[44]*.* Probation is a way to combat this issue and is a viable alternative to imprisonment when sentencing children in conflict with the law.

The introduction of a pilot probation scheme for minors in Rwanda would further encourage fair sentencing practices for minors. Probation aims to rehabilitate and give first time offenders another chance. Used extensively around the world, a probation system would strengthen Rwanda's criminal justice system.

2. INTRODUCE DIVERSION SCHEMES

Diversion schemes are a way to divert offenders who have committed minor crimes from the formal criminal justice system. In relation to minors, they assist in preventing children from becoming labelled and institutionalized at a young age. The introduction of such schemes would be in line with a general consensus to improve criminal justice for minors in Rwanda.

2.1. Introduction

The United Nations Standards Minimum Rules for the Administration of Juvenile Justice state clearly that where possible and appropriate diversion of young offenders should take place. These rules also make clear provisions for how such schemes should be administered. Specimen factors for the prosecution to consider for and against diversion, extracted from guidelines prepared by the Northern Ireland Public Prosecution Service, are set out in Appendix 2. Such factors would have to be tailored to fit the Rwandan context.

'11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.

11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, ***without recourse to formal hearings****, in accordance with*

[44] Justice for Children Policy and Strategic Plan Development, Rwandan Ministry of Gender and Family Promotion, January 2013, Para 2.4.7

the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these rules.

11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation for victims. '[45]

Many countries, in particular Australia, North America and many in Europe, have diversion programs in place to deal with young offenders. Under diversion schemes an offender does not get a criminal record with the aim to reduce recidivism. Diversion has been defined as: '*the channelling of prima facie cases from the formal criminal justice system on certain conditions to extra judicial programmes, at the discretion of the prosecution.*[46]'

Diversion works outside of the criminal justice system. Rather than sending a juvenile offender who has committed a petty crime into the criminal justice system the prosecutor redirects him/her to diversion programs. These programs exist in many forms. They can involve rehabilitation centres which may include counselling, training, job placement, community service, and victim compensation schemes. If the offender complies with the requirements of the diversion program the charges against him/her are dropped, however if they do not comply with the requirements the offender is returned for normal criminal processing[47]. Diversion schemes do not aim to make offenders less accountable or responsible for their actions, but instead aim to give offenders the opportunity to get their lives back on the right track while avoiding a criminal record[48].The introduction and use of diversion schemes in Rwanda would also be in line with the 7 year government programme and would help to achieve its target of 20% reduction each year of cases that go to courts, as a way of reducing backlog in courts as well as empowering and making use of other extra judicial community mechanisms[49].

Rwandan policy on the treatment of children in conflict with the law is making strides towards reform. The National Integrated Child Rights Policy states in section 6: '*Children in conflict with the law have the right to treatment that promotes their sense of dignity and worth and a justice framework that takes into account their age and aims at their reintegration into society*'. This indicates a shift away from the use of imprisonment for minors and the promotion of treatment catering for the specific needs of children.

[45]United Nations: Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"), United Nations, New York, 1986, Adopted by General Assembly resolution 40/33 of 29 November 1985

[46] L. Muntingh, The Effectiveness of Diversion Programmes - A Longitudinal Evaluation of Cases, NICRO, 2001

[47] Pre-trial Diversion from the Criminal Process, *The Yale Law Journal*, Vol. 83, No. 4 (Mar., 1974), pp. 827-854

[48] Muntingh, LM & Shapiro, R (1997) NICRO Diversions - an introduction to diversion from the criminal justice system, NICRO, Cape Town.

[49] Article 63 of the Government Programme (2011-2017), published November 2011,

*6.2. The comprehensive system for juvenile justice will be marked by the three pillars of '**diversion' (directing children away from judicial proceedings and towards community solutions**); 'restorative justice' (promoting reconciliation, restitution and responsibility through the involvement of the child, family members, victims and communities) and 'alternatives to custodial sentencing' (counselling, probation and community service)*[50].

The above provision indicates a political willingness for the development of diversion schemes as well as probation for minors in Rwanda.

The JRLOS survey titled 'The situation of minors in conflict with the law in Rwanda' states that:

- *'Government should seek to promote the establishment of alternative measures for dealing with minors in conflict with the law without recourse to judicial proceedings, provided that human rights and legal safeguards are fully respected (CRC, Article 40);*
- *Alternatives to imprisonment should be elaborated to avoid the incarceration of children;*
- *Diversion and alternative solutions'*[51] should be introduced.

The above recommendations echo the intentions of the government, however despite this to date there has been no actual development of such schemes.

2.2. Current treatment of minors in Rwanda

The organic law no. 51/2008 of 09/09/2008 relating to the organization, functioning and competence of courts, under article 75, establishes a special chamber, at the Intermediate Court level, for minors accused of criminal offences which is competent to hear/try such cases at the first instance level.

Article 76 of the same law requires the special chamber to order measures, in addition to the punishment given, aimed at protecting, assisting, follow up and rehabilitation of those convicted minors. However, in practice these complementary measures are rarely ordered by the courts and this might be due to the fact that judges are unable to identify a clear mechanism of how such measures would be implemented and/or followed up.

As at 5th December 2012 there were a total of 359 minors in prison in Rwanda[52].

Minors receive reduced sentences under the Penal Code:

Article 72: An offender or an accomplice of an offence aged at least fourteen (14) but less than eighteen (18) years

[50] National Integrated Child Rights Policy, Rwandan Ministry of Gender and Family Promotion, August 2011

[51] *Situation of minors in conflict with the law in Rwanda Comprehensive Report*, August 2011, Survey conducted by the JRLOS institutions, financial support from UNICEF, technical support by The Legal Aid Forum, Recommendations, paragraph 9.1.2

[52] Information provided by Commissioner General of RCS by letter dated 5 December 2012, Ref:2727/CG/RCS

When an offender or an accomplice is aged at least fourteen (14) but less than eighteen (18) years at the time of commission of an offence and if the sentencing appears necessary, the following penalties shall apply:

1° if he/she would be subjected to a life imprisonment or life imprisonment with special provisions, he/she shall be liable to a term of imprisonment of ten (10) years to fifteen (15) years;

2° if he/she would be subjected to a fixed-term imprisonment or a fine, he/ she shall be liable to penalties not exceeding half (1/2) of the penalties he/she would receive if he/she was aged eighteen (18) years.

The Penal Code and the Presidential Order on TIG are silent on the issue of minors, however from stakeholder interviews it has to be assumed that TIG is not an available alternative for minors[53]. Further, the participation of minors in TIG would be in direct violation of both local and international laws on the protection and treatment of children.

The UN Convention of the Rights of the Child[54] states at article 32;

'*States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.'*

And at article 37(c) that:

'*Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances'.*

Rwanda has introduced legislation on the protection of children to bring it in line with international standards. Law N°54/2011 of 14/12/2011 relating to the rights and the protection of the child specifies, under Chapter VII relating to children in conflict with the law, certain provisions in relation to the treatment of minors.

Article 62 in particular states:

> *'In pronouncing penalty against a child, the judge shall put forward decisions in form of alternative sentence to imprisonment such as deferred sentence, placement in re-education center to ensure the child's social welfare'*

[53]Interview with Ambassador Valence Munyabagisha, the Permanent Secretary in the Ministry of Internal Security, on 12 December2012

[54]UN Convention of the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, ratified by the Republic of Rwanda on 26 January 1990 and came into force on 24 January 1991.

Under the above mentioned law, a child cannot be held liable for his/her actions under the age of fourteen (14)[55].There is no further information on what constitutes a re-education centre and some of the judges that were interviewed stated that they were not aware of the existence of any re-education centres and therefore had no choice but to sentence minors to prison terms. There is a separate prison for minors in Nyagatare.

The legal protections for children under both international and Rwandan law, set out above, pave the way for broader reform of sentencing options for minors including the introduction of diversion schemes.

2.3. Current use of diversion in Rwanda

There is a diversionary fine system that is already in place in Rwanda, however this should be expanded and awareness of it should be increased. Under this system the judicial police officers and prosecutors can give a *pre-court* fine (amende transactionnelle) in case of minor offences[56]. After the (preliminary) investigation and collection of evidence, the prosecutor has the right to decide whether or not to file the case before the court (prosecute the offender). Article 43 of the Law N° 13/2004 of 17/5/2004 relating to the Code of Criminal Procedure, as modified and amended to date (hereinafter Code of Criminal Procedure), provides a prosecutor with four options upon receiving a criminal case file which include the option (or decision) to "*initiate the procedure of settling the matter out of court if he or she deems it the appropriate measure to compensate the victim, redress the effects of the offence and rehabilitate the accused"*. In this regard, article 36 of the Code of Criminal Procedure stipulates that "*For any offence that falls under his or her competence if a judicial police officer estimates that due to circumstances that led to its commission, a court is likely to impose a punishment of fine and if necessary, to order the eventual forfeiture of property, the judicial police can request the public prosecutor to invite the suspect to make a choice between filing a case against him or payment of a fine not exceeding the maximum fines to which are increments that are provided for by the law*".

The decision of the public prosecutor to order the payment of (pre-court) fine or *amende transactionnelle* and the acceptance *o*f the defendant to pay a fine without trial extinguishes or abates the criminal action.[57] This type of fine is a form of diversion already in existence in Rwanda and should be further encouraged.

2.4. Use of diversion schemes in other countries

Diversion schemes require a strong framework. The schemes themselves have to be appropriate as do the minors selected for such diversion schemes.

[55] Art. 58, Law N°54/2011 of 14/12/2011 relating to the rights and the protection of the child

[56] It is only applicable to offences that are punishable with an imprisonment not exceeding two(2) years (art.43(1)) of Code of Criminal Procedure)

[57] See article 3 para.2 of the Law N° 13/2004 of 17/5/2004 relating to the Code of Criminal Procedure, as modified and amended to date, *O.G* SPECIAL Nº of 30/07/2004.

Examples of some of the diversion schemes that exist for minors in South Africa are as follows[58]:

Youth Empowerment Scheme (YES)

This is a six-part life skills programme spread over six weeks, one afternoon per week. The programme normally involves 15 to 25 participants. The parents or guardians participate in the first and last sessions. A variety of issues are addressed, such as conflict resolution, crime and the law, parent-child relationships and responsible decision-making.

Pre-trial Community Service (PTCS)

In lieu of prosecution the offender has to perform a number of hours of community service at a non-profit organisation.

Victim Offender Mediation (VOM)

This programme gives the victim and offender the opportunity to meet and work out a mutually acceptable agreement with the assistance of a mediator with the aim of restoring the balance. Once an agreement is reached, this is reported to the prosecutor and the contract is then monitored.

Family Group Conferences (FGC)

In certain respects FGCs are very similar to VOM, except that they involve the families of the victim and the offender in the mediation process. The aim is also to work out an agreement with the assistance of a mediator or facilitator. Preventing recidivism is an important component of FGCs and all FGCs have to implement plans that will prevent further offending.

Victim/offender mediation programs are an opportunity for offenders to meet their victims face-to-face in the presence of a trained mediator. The parties have the opportunity to talk about the crime, express their feelings, to get answers to their questions, and finally to negotiate a resolution. Participation in mediation of this nature should always be voluntary for all parties involved. Such mediations resemble the gacaca and abunzi trials that form part of Rwanda's customary legal tradition.

The below table shows the use of victim/offender mediation programs internationally.

International Development of Victim Offender Mediation Programs	
COUNTRY	*NUMBER OF VICTIM OFFENDER MEDIATION PROGRAMS*
Australia	*5*
Austria	*Available in all jurisdictions*
Belgium	*8*
Canada	*26*
England	*20*
Finland	*130*
France	*40*

[58] L. Muntingh, The Effectiveness of Diversion Programmes - A Longitudinal Evaluation of Cases, NICRO, 2001, p.7

Germany	*293*
New Zealand	*Available in all jurisdictions*
Norway	*54*
South Africa	*1*
Scotland	*2*
United States	*15*

Source: The Network Interaction Spring 1996[59]

The above examples of diversion schemes can assist Rwanda in realizing its objective of diverting minors from prisons. The current law on protection of children specifically refers to rehabilitation centres for children in conflict with the law. Rather than sending children far from their families and disenfranchising them from their communities through depriving them of their liberty, diversion schemes and community schemes close to home for minors in conflict with the law are preferable. The success of such a scheme would then lead to the expansion across a greater geographical area. Diversion schemes will also reduce the number of minors in pre-trial detention and the number of minors in prisons which would be a cost saving for the government.

Diversion and community schemes will also enable children (young offenders) to continue their studies without any interruption or inconvenience hence contributing to the attainment of Rwanda's vision of becoming a knowledge-based economy.[60] Though some efforts are underway to organize education programs for minors in prisons, the quality of these programmes is still uncertain. Diversion schemes can focus on the re-education of young offenders focussed on preventing recidivism.

2.5. Advantages and disadvantages of diversion schemes

2.5.1. Advantages

The advantages of diversion are varied. The main advantage is that it provides a sustainable alternative to imprisonment for minors. Further, it can have a strong educational and training impact which will positively affect minors and reduce rates of recidivism. The introduction of a system of diversion is also in line with political sentiment in Rwanda and international best practice. Mediation schemes are also a form of restorative justice, which can assist in healing the victims of crime.

Diversion schemes do reduce the burden on the judiciary as cases do not go through the courts. This would be beneficial in Rwanda which struggles with its large case backlog. Also, as the minors do not proceed to prison, but instead are returned to their communities, the burden on the prison system is also alleviated as is prison overcrowding. Mediation schemes are well known to Rwandans through the abunzi scheme therefore programmes such as family group conferences and victim/offender mediation would be well received and be in line with the government's policy to resolve conflicts at the grassroots level and out of courts.

[59] Satisfying justice: safe community options that attempt to repair harm from crime and reduce the use or length of imprisonment, The Church Council on Justice and Corrections, Co-published by the Correctional Service of Canada, July 1996, p.39

[60] Republic of Rwanda, Rwanda Vision 2020, p.9, http://www.minecofin.gov.rw/webfm_send/1700, accessed on 24/02/2013.

2.5.2.Disadvantages

Given that prosecutors are the ones that have the discretion to choose which cases should be diverted and which cases should proceed to trial the prosecution retain a great deal of power. Such wide discretionary powers are, however, characteristic of diversion and alternative sentencing[61].

Another disadvantage of diversion schemes is that they can be costly. The relevant schemes have to be set up and staffed with well-trained individuals. This is not an overnight solution as the necessary framework has to be solid before diversion can begin. Prosecutors also have to be well trained on the criteria to use when selecting minors for diversion schemes.

One criticism of diversion schemes is that it leads to an expansion in the number of individuals who are subject to state supervision/intervention ("net-widening"). In other words, minors who previously would have only received a reprimand or a caution and returned home become subjected to diversion schemes which are meant for perpetrators of more serious offences. This has the knock on effect of leaving the number of cases that go through the formal court system untouched.

2.6. Implementation in Rwanda

As a policy recommendation, the introduction of diversion schemes needs to be gradual and should utilize pre-existing structures and be introduced from the grassroots level up to the district level.

Pilot Family Group Conference (FGC) Scheme

A pilot FGC scheme, which is similar to victim/offender mediation, however includes the families of both parties, could be introduced in a specific district using pre-existing resources. Karongi would be a good district to commence such a pilot as they already have probation officers/TIG co-ordinators operating at the sector levels.

Strict factors, based upon those set out in Appendix 2, would be drafted that would assist prosecutors in deciding whether offenders should be subject to diversion schemes. The police and prosecutors in the selected district would be trained on the relevant criteria. The main criteria that should be taken into account by prosecutors when selecting candidates, appropriate for diversion schemes, are broadly as follows:

a. *First time offender;*
b. *Nature and circumstances of the offence;*
c. *Age;*
d. *Family situation;*
e. *Fixed abode;*
f. *Character; and*
g. *Willingness.*

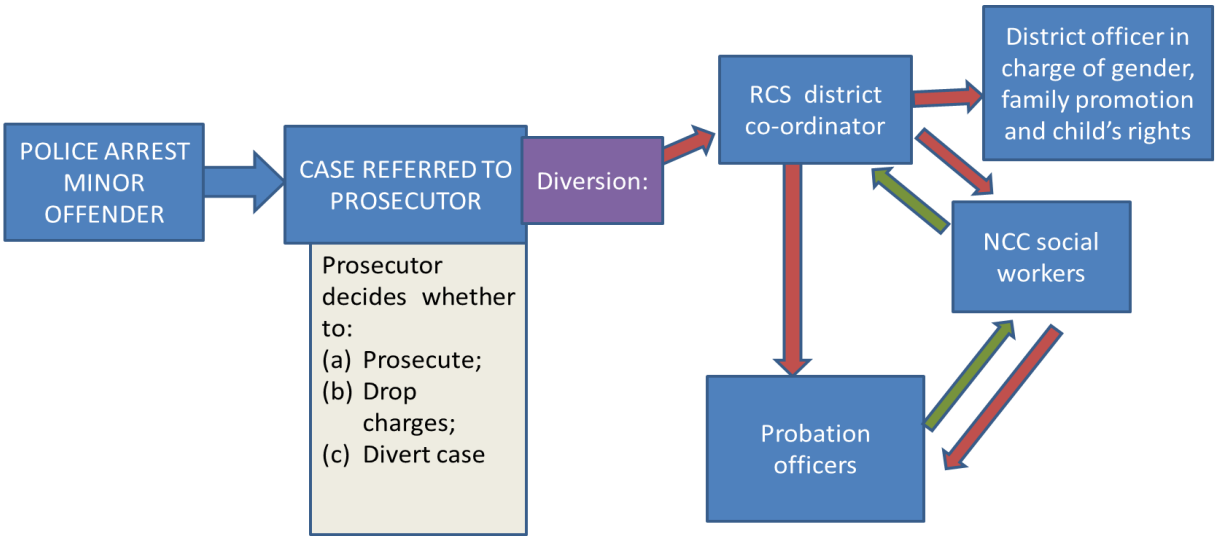
Upon arrest, a minor's case would immediately, within a very short prescribed time period, be referred to the prosecutor. The prosecutor would then decide whether to prosecute, drop the charges or propose diversion. Diversion will be selected where the relevant factors are applicable

[61] Muntingh, L. Prosecutorial Attitudes Towards Diversion, NICRO, Cape Town, 1998, p.7

and the crime is classed as a petty crime. Where diversion is chosen the prosecutor would pass the file to the relevant RCS co-ordinator at the offender's district. The RCS co-ordinator would liaise with the NCC social workers, the district officer in charge of gender, family promotion and child's rights. The probation officers introduced to supervise offenders on probation would also be able to manage, at the local level, diversion schemes. Diversion schemes would be based at the grassroots level and supported by civil society organizations focussed on re-education and restoring harmony.

The NCC social workers, who would have received training in social work, would be well placed to mediate at family group conferences or victim/offender mediation diversion schemes. Alternatively the Abunzi could be used to mediate mediation focussed diversion schemes following revision of their competences. It would, however be preferable, in light of the criticism that the Abunzi act more as judges than mediators[62] , for the NCC social workers to carry out such mediations especially given their more informal nature.

The offender would have to consent to participating in any diversion scheme. At the FGC the parties have the opportunity to air their grievances and come to a final agreement on how to resolve the problem and prevent the offender from re-offending in the future. This settlement could involve counselling sessions for 6 months to a year, re-education, where appropriate a work placement to raise the offender's awareness of the harm done, a big brother/sister system, or some sort of compensation arrangement. The probation officer would be responsible for overseeing the implementation of the terms of the agreement. A copy of the agreement reached at the FGC would be filed with the prosecutor who would monitor the progress in collaboration with the probation officer. The RCS co-ordinator at the district would also receive a copy of the agreement and would provide support and guidance to the probation officers. Upon successful completion of the terms of the agreement the charges against the young offender would then be dropped. The below chart sets out the parties in this process:



[62] See RCN Justice et Démocratie, *Fonctionnement des Comités de Conciliateurs (Abunzi) au Rwanda: Perceptions, Observation and Analyse,* Septembre 2011, p. 25-27. International Development Law Organization (IDLO*), Enhancing Legal Empowerment through Engagement with Customary Justice Systems*, 2011, p. 31-35. Chemonics International, *Abunzi capacity Assessment,* October 2012, p.19-21.

The Abunzi, of which there are 30,792[63] in Rwanda, already have the competence to mediate certain criminal cases up to a value of RWF 3 million[64]. This competence could be further extended to enable the Abunzi to mediate FGCs for minors and to enable them in certain cases to impose cautions as another diversionary method to redirect minors away from the formal justice scheme. This is in line with the draft 'Justice for Children Policy and Strategic Plan Development' which advocates for the creation of capacity within the Abunzi system of '*child-responsive and child-friendly justice in Rwanda's context'*[65]. Where the Abunzi are used for diversion, a strong communication system between the parties in the above chart and the Abunzi would have to be put in place. In the alternative, due to poor knowledge and/or application of mediation to resolve disputes whereby they judge the dispute (and the disputants), rather than act as facilitators who try to bring them closer together[66], the Abunzi may not be the most suitable individuals to mediate and play a role in diversion schemes. Diversion schemes are a less formal setup than Abunzi mediations and are a way to decide how an offender who has already been diverted from the formal justice system should make right the wrongs committed. This is a very different framework than the existing Abunzi trials where mediation proceedings look like courtroom hearings presided over by judges; therefore it may be of some value to use the NCC social workers rather than the Abunzi to carry out the mediations. The NCC social workers could bring a fresh approach free from any preconceived ideas.

Any persons involved in diversion schemes would also require intensive training on how to deal with minors.

The pilot scheme, set out as an example above, would utilize pre-existing resources and traditional Rwandan systems of justice to divert minors from the formal criminal justice system. Diversion schemes could then be further expanded to deal with the needs of minor offenders, with a specific focus on re-education.

The administration of diversion schemes should comply with international best practice rules, for instance the consent of both the juvenile and his parent or guardian should be sought[67].

2.7. Conclusion

Rwanda is ready for diversion schemes for minors in conflict with the law. Such schemes should be set up gradually and in compliance with international laws. The use of probation officers, NCC social workers, the RCS co-ordinator and perhaps Abunzi mediators in the implementation of a pilot

[63] Organic Law N° 02/2010/OL of 09/06/2010 on organisation, jurisdiction, competence and functioning of the mediation committee, Article 4.
[64] Organic Law N° 02/2010/OL of 09/06/2010 on organisation, jurisdiction, competence and functioning of the mediation committee, Article 9.
[65] Draft Justice for Children Policy and Strategic Plan Development, Rwandan Ministry of Gender and Family Promotion, January 2013, Para 4.1.13
[66] See RCN Justice et Démocratie*, Fonctionnement des Comités de Conciliateurs (Abunzi) au Rwanda: Perceptions, Observation and Analyse,* Septembre 2011, p. 25-27. International Development Law Organization (IDLO*), Enhancing Legal Empowerment through Engagement with Customary Justice Systems*, 2011, p. 31-35. Chemonics International, *Abunzi capacity Assessment,* October 2012, p.19-21. Rwanda Governance Board, *Survey on the Performance of Mediation Committees*, February 2012, p.65.
[67] [67]United Nations: Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"), paragraph 11.3

diversion scheme would be a good use of pre-existing resources and local knowledge. A pilot scheme can be carefully monitored to measure its effectiveness and subsequently extended or revised as is deemed necessary.

3. DEVELOP NEIGHBOURHOOD TIG FOR NON-GENOCIDE RELATED OFFENDERS

Neighbourhood TIG, resembling more closely community service schemes in other countries, should be prioritised for non-genocide crime tigistes. Punishment should be proportionate to the crime, and whereas TIG carried out in camps may be appropriate for genocidaires who committed terrible crimes, it is not appropriate as a more lenient alternative for lesser criminals. RCS focuses heavily on the financial benefits of TIG and the output in terms of production of the TIG camps. This should be a side benefit of TIG rather than a central tenet of TIG to ensure that it is not seen as exploitation of a free labour force and instead is seen as a way to rehabilitate and assist offenders to reintegrate into society and improve their behaviour. Reasons for the expansion of neighbourhood TIG are set out in more detail below.

3.1. Background of TIG

The TIG program was introduced in 2005 in order to deal with the immense number of genocidaires. The TIG program assisted in decongesting prisons, reconciling the general population, and rebuilding the country.[68] There was no maximum number of years that an offender could carry out TIG as there are in other countries[69], nor was TIG reserved for petty offenders as elsewhere. With the expansion of TIG to petty offenders, community service in Rwanda will resemble recognised practice with some very large exceptions. Firstly the sentence of community service is only for half of an offender's sentence for offences punishable by imprisonment of six months and above rather than in lieu of any time in prison, which means that it is only a partial alternative to imprisonment. Secondly community service in Rwanda is for the most part, unless community service is carried out locally due to age and illness, carried on in camps which for all intents and purposes deprive the offenders of their liberty. This is not community service as understood elsewhere in the East African Community and more widely in the world, where an offender stays at home and each day reports to his/her community service programme to carry out his/her sentence. The difference may be attributed to the origins of TIG in Rwanda which was a sentence for genocidaires who had committed heinous crimes. Given that the new Penal Code expands TIG to lesser offenders, a system more akin to its neighbours is no doubt necessary in order to ensure that the alternative is both a true alternative to imprisonment and is proportionate to the crime committed.

All sentences should be proportionate to the crime committed, TIG being no exception. TIG in camps may be a proportionate sentence for genocide related crimes but does not appear to be a proportionate sentence for ordinary (lesser) crimes. The current *tigistes* in camps committed the

[68]The National TIG policy in "Ubunyamabanga Nshingwabikorwa bwa Komite y'Igihugu y'Igihano Nsimburagifungo cy'imirimo Ifitiye Igihugu Akamaro, *Imfashanyigisho ku Gihano Nsimburagifungo cy'Imirimo Ifitiye Igihugu Akamaro (TIG),* 2005", pp. 38-39.

[69] Note that the limit of one year for TIG carried out more than the normal 3 days a week, as a way of shortening the sentence, in case of TIG performed in a host institution (art. 32 of the Presidential Order No. 10/01 OF 07/03/2005) was later deleted by the Presidential Order No. 50/01 OF 16/10/2005 modifying and complementing Presidential Order No. 10/01 OF 07/03/2005.

most heinous crime, the crime of genocide. Their crimes, also contributed to the total destruction of the country. Given their crimes, the isolation of genocide offenders carrying out TIG in camps and therefore the deprivation of liberty, is more appropriate. The focus on productivity for TIG camps is also understandable in light of the role of genocidaires in destroying the country during the 1994 genocide.

It should also be remembered that the punitive element of imprisonment is: the loss of liberty. Therefore, as the term alternative to imprisonment implies, the punitive element of alternative sanctions should be different from that of imprisonment. With the use of TIG camps in Rwanda there is a risk that these camps be perceived as a second prison rather than a true non-custodial sentence. In consideration of the above reasons, priority should be given to neighbourhood TIG for non-genocide offenders sentenced to TIG. Measures should be taken to gradually phase out the use of camps in the execution of TIG. This requires a strong decentralized monitoring structure involving the local authorities and the community in general.

3.2. Neighbourhood TIG vs. TIG in camps:

The table below sets out some of the main differences between neighbourhood TIG and TIG carried out in camps.

	Neighbourhood TIG	**TIG in camp**
Number	296	8,577[70]
Living conditions of *tigistes*	They live at home and so it's easy for them to manage sanitation issues.	The hygiene in camps is not good which may have adverse effects on those that already have health problems.
Hours of community service per week	24 hours	45 hours
Type of work	Legally speaking the type of the work is the same for neighbourhood TIG and camp TIG but mostly *tigistes* in neighbourhood TIG carry out work in the form of road clearing, garden planting and maintenance, stone picking, and building houses for vulnerable people.	*Tigistes* in camps are mostly involved in big projects such as infrastructure projects (roads, bridges, schools, hospitals including cutting stones to use in building etc.) as well as environment and agricultural projects (such as terracing, tree planting/ afforestation, swamp clearing etc.).[71] The work in camps is heavy compared to that done by neighbourhood TIG.
Cost of supporting each tigiste per year (RWF)	N/A they carry out TIG staying at their homes	345,870[72]

[70] Information provided by Commissioner General of RCS by letter dated 5 December 2012, Ref:2727/CG/RCS

[71] It is worth mentioning that the law does not differentiate between the activities (projects) to be executed by the tigistes in TIG camps and those serving their TIG punishment from home. See article 6 of the presidential order no.66/01 of 02/11/2012 determining the modalities of implementation of community service as an alternative penalty to imprisonment.

[72] Information provided by Commissioner General of RCS by letter dated 5 December 2012, Ref:2727/CG/RCS

Currently, the Presidential Order gives RCS the exclusive competence of selecting where persons sentenced to TIG serve their punishment.[73] It is up to RCS to determine whether they shall perform neighbourhood TIG or TIG in camps. The only criterion provided by the law in placing *tigistes* in their places of work is *productivity*. Productivity should not be the central factor in determining the placement of *tigistes*; instead rehabilitation and reintegration back into society should be the key drivers. This is also in line with the Tokyo Rules which provides that alternatives to imprisonment should be aimed at increasing the offender's chances of social integration (12.2).

3.3. Advantages and disadvantages of Neighbourhood TIG Vs TIG in camps

	Neighbourhood TIG	**TIG in camps**
Working hours	24 hours a week. However, takes longer for a convict to complete his/her TIG sentence.	45 hours a week. Takes shorter time as *tigistes* in camps work six days a week.
Working and living conditions	Live at home. *Tigistes able to* work for a living, and therefore support their families, on the days they are not carrying out TIG. *Tigistes* with chronic diseases are able to be cared for by family members.	Live in tightly packed sleeping quarters often without bed nets or sufficient roofing. Sanitation is often inadequate which can aggravate health problems. Those who do not get permission to serve their sentence close to their homes (through neighbourhood TIG) carry out TIG in camps (often far from their homes) exclusively until they have completed their sentence.
Food	N/A. They eat at home	Have two meals a day. They get the first meal, which includes porridge, at 2pm after finishing work and get the second one (which is dinner) at around 5pm.
Education (vocational skills)	It is difficult to implement professional and vocational training programmes.	*Tigistes* in camps get the opportunity to acquire new professional/ vocational skills (such as, carpentry, weaving skills etc.) after their normal working hours. *Tigistes* in camps also receive education sessions/talks about national unity and reconciliation programmes as well as national developmental programmes.
Cost to the government	It is less costly to the government as food, accommodation and medical care for the *tigistes* is not paid for.	The government has to provide food, accommodation, medical care and security for the *tigistes.*
Impact	Facilitates reconciliation and reintegration due to the greater contact of the offender with the community/victim. Also, acts as a very good platform for the judiciary to	Isolates offenders from the community. More focused on economic benefits and productivity. The victims do not witness first hand

[73] Article 12 of the PO no.66/01 of 02/11/2012 determining the modalities of implementation of community service as an alternative penalty to imprisonment.

	show victims that justice has been done.	justice being done by seeing the offender performing community service in the neighbourhood.
Proportionality	More justifiable for ordinary crimes	May be justified for genocide offenders as they contribute to the rebuilding of the nation which they greatly participated in destroying. Limitation of liberty is also more proportionate to genocide related crimes as the community/victims had greatly been traumatized by the unspeakable crimes committed during the genocide.
Management	The management and supervision of *tigistes* in neighbourhood TIG is quite difficult, as it is hard to ensure 100% attendance; requires a well-structured decentralized structure with very strong collaboration and participation of the local authorities. Each neighbourhood working site (administrative sector) has its own supervisor.	Relatively easy to manage as convicts are in the same area. Just requires good number of security guards; TIG camp management is composed of the TIG camp supervisor, the deputy, logistician, the security guard(s) and in some camps a nurse.
International standards	In line with the international standards on community service. *Tigistes* perform their community service from home and therefore there is no deprivation of liberty.	Limited freedom and hence could be equated to prisons or "labour" camps and not a full non-custodial sentence. *Tigistes* are only able to leave the camp for 10 days a year (if their sentence is over 1 year) to visit their families.
Community participation	Entails the participation of the community in administration of justice as they can monitor and report on the work of *tigistes* where something is going wrong.	TIG camps are in general isolated from communities so there is limited community participation.

Most of our interviewees favoured neighbourhood TIG and emphasized that neighbourhood TIG would be more successful in reconciliation and reintegration of convicts into the society given that victims can see offenders carrying out their sentence and this kind of TIG involves greater contact between *tigistes* and the community.[74] Moreover, neighbourhood TIG allows *tigistes* to at least partly fulfil their economic and social duties towards their families. It is worth mentioning that among the 6 *tigistes* interviewed in Nyanza, Huye and Nyarugenge camps, that had experienced both neighbourhood TIG and TIG in camps, 4 favoured TIG in camp and 2 favoured neighbourhood TIG. However, none of the 5 interviewed *tigistes* doing neighbourhood TIG, favoured TIG in camp. The main reason in favour of carrying out TIG in camps was the fact that offenders are able to

[74]Interviews with presidents of Nyarugenge and Gasabo Intermediate courts, president of Kacyiru Primary Court as well as our interviews with the Amb. Valens Munyabagisha, the PS in ministry of Internal Security and that with Mr. Eugene Rusanganwa, the Principal State Attorney in the ministry of Justice . See also K. Sasaki and F. Bayisenge, *Community Service for Reinforcing Reconciliation: Perspectives on Rwanda's TIG program*, p.93.

complete their sentence faster compared to neighbourhood TIG[75]. On the otherhand, those who favoured neighbourhood TIG said that it helped them to continue supporting their families but also that it facilitated reconciliation as the offender gets to meet the victim.

Further, the use of neighbourhood TIG would bring the Rwandan system in line with traditional community service models internationally, including those available in neighbouring EAC countries.[76]

3.4. Implementation of recommendation on neighbourhood TIG

It is understood that the management and supervision of neighbourhood TIG may be more challenging compared to TIG in camps where *tigistes* are all living in the same camp. Below is our proposal on how neighbourhood TIG could be managed.

It is necessary to set up a strong supervision and monitoring system for TIG from RCS at the national level to the sector level. There must be sufficient permanent staff in charge of supervising and monitoring TIG at the district and sector levels pursuant to a set supervising staff ratio. Alternatively placement institutions have to provide supervisors who may be less expensive than accommodating and feeding *tigistes* in TIG camps. Community supervisors (community service officers) have to work closely with local defence forces, *inkeragutabara* and police to track down escapees within a set time limit. They should also be entrusted with the power to supervise all non-custodial court orders in their respective jurisdictions and provide liaison between institutions involved in TIG.

It is clear from our interviews with *tigistes* carrying out neighbourhood TIG and those in charge of supervising the neighbourhood TIG work sites; that *tigistes* attendance rates are low and enforcement of their attendance is weak. To deal with unjustified absenteeism and make sure that *tigistes* doing neighbourhood TIG take it seriously, a warning system for *tigistes* should be introduced. The system would take the form of three formal warnings to the *tigiste* neglecting his/her duties after which the concerned *tigiste* would be taken before a judge. During this hearing the *tigiste* would be given the opportunity to dispute the breach and the judge could then make a final decision as to whether the *tigiste* should continue their community penalty given the circumstances of the breach, or alternatively whether they will be placed in prison. To avoid abuses in the system, the TIG site supervisor should first seek approval from the RCS official at the national level before issuing the third and final warning and if issued a police commander in that area should be provided with the copy.

3.5. Conclusion

Neighbourhood TIG presents a lot of advantages for both the government and convicts. RCS as well as other justice sector stakeholders have convergent views regarding the advantages of neighbourhood TIG. The question arises as to whether TIG carried out in camps can be considered an alternative to imprisonment, given the living conditions and deprivation of liberty. Neighbourhood TIG on the other hand is more of a justifiable alternative to imprisonment,

[75] This is because *tigistes* in camps work six days a week well as those doing neighbourhood TIG work three days a week and use the remaining days to work for their families.
[76] See Penal Reform International, *Alternatives to Imprisonment in East Africa: Trends and Challenges*, 2012.

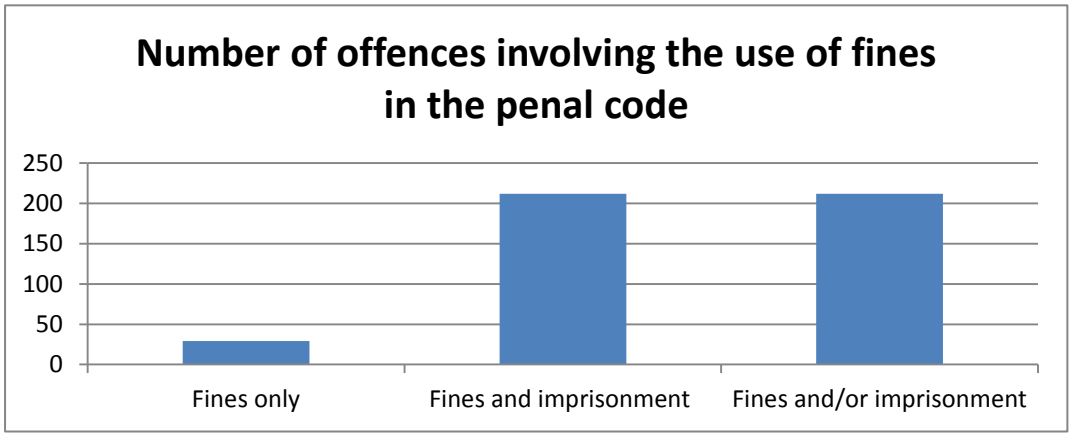
proportionate to lesser crimes. TIG carried out in camps should be maintained for genocidaires however neighbourhood TIG should be developed for non-genocide related offenders. The successful implementation of this recommendation requires full cooperation between the local authorities, RCS, police and courts in order to strengthen the neighbourhood TIG framework.

4. INCREASE USE OF FINES

Fines are generally supplementary punishments under the Rwandan Penal Code, imposed in tandem with a custodial sentence rather than as a stand-alone punishment. The use of fines should be further developed to reduce overcrowding in prisons however fines should be adjusted in order to be proportionate to the means of each offender. For fines to be proportionate to the means of the offender, a system of day-fines should be introduced in the Rwandan criminal system.

4.1. Legal framework for fines in Rwanda

In Rwanda the fine as the main penalty applicable to natural persons is governed by Organic Law N° 01/2012/OL of 02/05/2012 instituting the Penal Code in its Article 31. The amount of a fine for different offences is provided in the Penal Code. In some instances, a fine is the only possible penalty for a given offence[77], in others the judge has the option to order the convict to pay a fine or to sentence him/her to imprisonment[78] while in others the judge is bound to order a fine in addition to imprisonment.[79] The below table shows the number of offences attracting solely a fine, a fine or imprisonment and a fine and imprisonment:



This table clearly demonstrates that there are relatively few offences that only attract a fine, which significantly limits the use of fines as an alternative to imprisonment in Rwanda.

4.2. The current use of fines by courts

Although there are offences in which the law gives the judge the discretion to either order a fine or prison sentence, in practice most judges tend to pronounce prison sentences rather than fines for a number of reasons including societal pressure (in support of imprisonment) and to avoid the risk of

[77] See for example Art. 392 of the penal code.
[78] See for example Art. 389 of the penal code.
[79] See for example Art. 426 of the penal code.

being accused of corruption[80]. Most importantly , interviewed judges and prosecutors have revealed that, due to heavy fines in the (new) Penal Code and the economic status of most Rwandans, where the law allows for the option between a fine and imprisonment prosecutors and judges are often inclined respectively to request or sentence offenders to custodial sentences.

The below table sets out examples of the limits placed on judges by the Penal Code:

Offense	**Prison sentence**	**Fine**
Offering a gift in order to get a service(art.640)	2 – 5 years	And 2 – 10 X value of the illegal advantage granted or promised
Knowingly issuing a bouncing cheque, withdrawing funds after issue of cheque, knowingly receiving a bouncing cheque (Art. 373)	2 – 5 years	And 5 – 10 X the value of the cheque
Tax evasion (art. 369).	At least 3 – less than 6 months	And fine equal to evaded tax
Non-payment of withholding tax (Art. 370)	6 months – 1 year	And fine equal to evaded tax

The offences listed in the table above could, in certain circumstances, be dealt with by only imposing a fine and still achieve the required punitive effect. This would help to reduce the problem of prison congestion as well as avoid adverse effects of imprisonment which don't only affect the offender but also reach the whole family. The above list is just an example of where the legislator could have provided the judge with an option either to give a prison sentence or just a fine.

The table below gives examples of fines that would far exceed most Rwandans' income:

Offence	**Imprisonment punishment**	**Fines**
Not compliance with the distance required from the banks of rivers and shores of lakes and respect of reserved areas (art. 429)	2 months –less than 6 months	And/or 500,000 – 5,000,000 RWF
Family desertion (by either spouse) (art. 243)	at least 3 months – less than 6 months	and/or 200,000 – 3,000,000 RWF
Fraudulent use of water (art. 394)	6 months – 1 year	And/or 1,000,000 – 3,000,000 RWF
Recklessly throwing at another person anything that is likely to disturb or dirty him/her (art. 161)	8 days – 2 months	and/or 50,000 – 200,000 RWF
Assault and battery resulting from lack of foresight and precaution (art. 158)	8 days – 2 months	and/or 100,000 – 500,000 RWF
Verbal threats accompanied by an order or condition(art.170)	2 months – less than 6 months	and/or 500,000 – 1,000,000 RWF

The amount of the fines set out in the above table may seem small, but as some judges mentioned in our interviews, these fines would hardly be affordable to many Rwandans considering the fact that 44.9 % of Rwandans are still living below the poverty line[81]. May be to deal with the inflation

[80] Interviews with presidents of Nyarugenege and Gasabo Intermediate courts. Also, interview with Kacyiru primary court president.

[81] National Institute of Statistics of Rwanda, "The Evolution of Poverty in Rwanda from 2000 to 2011: Results from the Household Surveys (eicv)", 2012.

issue and make fines keep their punitive effect there could to be introduced a system whereby a judge can apply a certain (decimal/small) rate, set by the law, and increase the fine of the offender to adapt to the currency value (inflation) at a time. This method helps to fight issue of fine becoming obsolete due to economic/currency changes.

4.3. Advantages of extending the use of fines

The extensive use of fines as a sentencing option would be advantageous for various reasons. Below are some of the advantages of fines:

1. Fines penalize the criminal without imposing costs on the government and instead generate money for the government;
2. Fines are appropriate and proportionate punishment for non-violent crimes; and
3. The increased use of fines could also help to decongest the overpopulated prisons.

Like any other punishment, fines achieve the goal of sentencing and are an effective sentencing option where a person is convicted of a fairly trivial offence. Fines are useful for property and greed crimes and are a more moderate option for minor offences. It should be remembered, however, that a fine is only advantageous if an offender has the capacity to pay.[82] The expansion of fines would go hand in hand with tailoring fines so that they are proportionate to the amount an offender is able to pay through the introduction of day-fines.

4.4. Introduction of Day-fines

Day-fines have been defined as "[a] more sophisticated way of relating fines to the ability of offenders...."[83] The seriousness of the offence is first expressed in number of days or units and then the average daily income of the offender is determined.[84]

The system of day-fines[85] that are proportionate to a day's earnings has a lot of merit and could be introduced in Rwanda to ensure that there is no injustice resulting from very high fines. Poor and rich offenders will be equally affected by the penalty contrary to traditional fines (tariff fines) which disproportionately punish poor offenders over wealthier offenders. The introduction of day-fines would require additional training for judges on their value and how to use them in practice. Since Day-fines are calculated using two factors: the gravity of the offence and the offender's daily income,[86] clear written guidelines for judges are necessary. Such guidelines could rank offences by severity and assign them fine units each and set out the relevant criteria to consider when calculating the daily income of the offender.

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[82] Katherine McFarlane and Patrizia Poletti, *Judicial perceptions of fines as a sentencing option: A survey of NSW [New South Wales] magistrates,* Monograph, New South Wales Sentencing Council, 2007, p. 42.
[83] UN, *Handbook on basic principles and promising practices on Alternatives to Imprisonment*, 2007, p. 30.
[84] *Ibidem.*
[85] A day-fine is a unit of fine payment that, above a minimum fine, is based on the offender's daily personal income. A day fine represents one day incarcerated and without salary (seehttp://en.wikipedia.org/wiki/Day-fine, accessed on 5/02/2013).
[86] Edwin W. ZEDLEWSKI, *Alternative to Custodial Supervision: The Day Fine,* Discussion Paper, 2010, p. 2.

The calculation of day fines can be presented as follows:

NUMBER OF DAYS OR UNITS	×	AVERAGE DAILY INCOME OF OFFENDER	=	AMOUNT OF DAY FINE

4.5. Conclusion

The introduction of day-fines to the Rwandan penal system would be a positive and fair initiative. It would help to reduce judges' reticence to impose fines instead of a prison sentence. However, judges should in general be encouraged to overcome societal pressure and pass non-custodial sentences (including fines) where necessary and appropriate.

5. INCREASE USE OF SUSPENDED SENTENCES

Suspended sentences help to reduce the pressure on prisons and give offenders an opportunity to pursue their ordinary lives. Despite legal provisions for the use of suspended sentences, our interviews with judges revealed that in practice suspended sentences are mainly used in traffic offences.[87] This selective use of suspended sentences by judges reduces sentencing options for other offenders.

5.1. Legal framework for suspended sentence

The suspension of a penalty is governed by Articles 85 to 87 of the Penal Code. The suspension of a penalty can be ordered if the imprisonment does not exceed five (5) years and the convict has not been previously sentenced, by a final judgment, to an imprisonment or TIG of more than six months. Suspension may cover all or part of the main or additional penalties. Suspended sentences should only be used where a custodial sentence would have been imposed to avoid the issue of net-widening.

5.2. Current use of suspended sentences by courts

The use of suspended sentences is still very low in Rwanda today. Interviews conducted among judges and prosecutors revealed that suspended sentences are rarely applied in practice in Rwanda and are almost only applied for road traffic offences and at times applied to minors. Despite their low use in Rwanda, suspended sentences present a range of advantages.

5.3. Advantages of extending the use of suspended sentences

The main advantage of a suspended sentence is its deterrent and rehabilitation value. The rehabilitative and deterrent advantage of a suspended sentence is founded in its purpose which is:

[87] Interviews with presidents of Nyarugenge and Gasabo Intermediate courts and president of Kacyiru Primary Court.

> *...to denote the seriousness of the offence and the consequences of re-offending, whilst at the same time providing [an offender who is subject to this sanction] an opportunity, by good behavior, to avoid the consequences*.[88]

According to Weatherburn and Bartels, "*the deterrent effects of suspended sentence are assumed to be more effective (...) because with suspended sentences the consequences of re-offending during the operational period are both known and certain*".[89] In Rwanda, if the convict sentenced to a suspended sentence commits a felony or misdemeanour during the period set by the court in a judgment ordering suspension of a penalty he/she will serve the remainder of the suspended sentence in prison and time for the new offence.[90]

The other main advantage of the suspended sentence is, according to some, that it is a strategy to reduce prison population size.[91] Finally, a suspended sentence helps to avoid the possible negative effects of imprisonment.[92]

5.4. How to expand the use of suspended sentences

The law states that a judge who orders the suspension of a sentence must justify his decision; but it does not contain any details on what this justification should include.[93] Therefore, the expansion of the use of suspended sentences requires the development of sentencing guidelines outlining the criteria courts should base their decision on in order to apply this alternative penalty consistently countrywide. Interviews with judges revealed the following factors as the most important when awarding a suspended sentence:

- Family situation: being the family supporter or having young kids;
- Circumstances surrounding the commission of the crime i.e. before, during and after the commission of the crime;
- The health status and energy of the suspect/offender;
- The age of the offender; and
- The seriousness of the crime.

The establishment of a sentencing council in charge of overseeing the application of suspended sentences, among others, to ensure these alternative penalties are applied consistently across the country, would also be given a red carpet welcome. Finally, there is a need for community and justice actors' education programme on the essence and purpose of suspended sentences.

[88] BOB DEBUS quoted in New South Wales, Parliamentary Legislative Council, Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations*, Report, 2006, p. 111.
[89] S. ARMSTRONG et al., *International Evidence Review of Conditional (Suspended) Sentences,* Final Report, the Scottish Centre for Crime & Justice Research, 2013, p. 16.
[90] Art. 86 of Rwandan Penal Code.
[91] S. ARMSTRONG et al., *op. cit.*, p. 12.
[92] State of Victoria, Sentencing Advisory Council, *Suspended Sentence,* Discussion Paper, 2005, p. 116.
[93] Art. 85 Para. 2 of the Rwandan Penal Code.

6. IMPROVE SENTENCING INFORMATION AVAILABLE TO JUDGES FOR SENTENCING PURPOSES

In order for sentencing to be fair and just, the necessary relevant background information on an offender has to be available to a court. Currently the information available to judges in Rwanda for sentencing purposes is inadequate. This was confirmed by all the judges that were interviewed. The current document is a police report included in the dossier, which only contains basic information on the offender such as their name, address and marital status. It is on this basis that we recommend the introduction of improvements in the area of sentencing information in Rwanda.

SENTENCING INFORMATION IN OTHER COUNTRIES

In **Uganda**, the police fill in a community service pre-sentence report (form 103) which contains the following information on an offender[94]:

- *whether the offender is a first, second or habitual offender;*
- *Information about the background of the offender that is seen as relevant to his/her suitability for community service (for example if he/she is in dispute with his/her family or is a heavy drinker);*
- *Information about whether the offender has a settled place of abode;*
- *Information about whether the offender consents to a community service sentence; and*
- *Information about whether the community supports community service in this particular case.*

In **Kenya** the courts request a pre-sentence report to be prepared by the Probation Service. **Zimbabwe** also has a strong system of pre-sentence assessment reports carried out by community service officers, '*without the reports furnished to the court before sentence is passed, the court would be severely hidebound in its effort to consider the appropriateness of community service as a sentencing option*'[95].

Such reports contain more detailed background on the offender than the current identifying police report included in dossiers in Rwanda. A more detailed report would serve to inform judges and therefore enable them to be better prepared for sentencing. '*Those magistrates and judges who are aware of the law and at least willing to consider an alternative are only likely to impose one if there is a positive recommendation that they should do so'*[96]. Such a report can also include recommendations by the relevant probation officer on whether a non-custodial sentence is appropriate giving reasons.

Given the backlog of cases in Rwanda, the responsibility to find out more about an offender and the circumstances of the offence cannot be the responsibility of judges. With the introduction of a probation service in accordance with the recommendation set out above, TIG co-ordinators/probation officers at the sector level could be responsible for preparing such reports. RCS

[94]Penal Reform International, Alternatives to Imprisonment in East Africa: Trends and Challenges, 2011, p.16

[95]Community Service in Practise – Zimbabwe, Penal Reform International and the Zimbabwe National Committee on Community Service (ZNCCS), 1997, p.28, doc.8

[96]Penal Reform International, Alternatives to Imprisonment in East Africa: Trends and Challenges, 2011, p.22

coordinators/Probation officers could also use the already existing network of paralegals[97], from civil society organizations, to assist them in gathering the required information.

6.1. Advantages to improving sentencing information

Improving sentencing information will assist judges in exercising their discretion when sentencing offenders, especially when using alternatives. This information, if collected by a probation service, would also serve to assist the prosecution when deciding which minors should participate in diversion schemes. Furthermore the judges that we interviewed were very receptive to the idea and would welcome the introduction of improved sentencing information.

6.2. Way this can be implemented

6.2.1. Form

Improved sentencing information can be provided to a judge in accordance with a pro forma form to be completed by the relevant probation officer in charge of the case. This form would include such information as the impact of the offence on the victim and the seriousness of the crime. Other information that the report should include are broadly set out as follows:

a. A brief outline of the offence
b. Whether the offender accepts responsibility for the offence
c. Whether the offender recognises the impact and consequences of the offence on the victim
d. Whether the offender recognises the impact and consequences of the offence on the community
e. Whether the offender is a habitual offender
f. Whether accommodation was relevant to the offending behaviour
g. Whether education, training, employment and/or basic skills were relevant to the offending behaviour
h. Whether finance is relevant to the offending behaviour
i. Whether alcohol and/or drug misuse linked to the offending behaviour
j. Whether the mental health of the offender is linked to the offending behaviour
k. An assessment of the offenders thinking and behaviour, for instance:

> ***Thinking and Behaviour:***
> *Is there evidence that the offender:*
> *Demonstrates inadequate social/interpersonal skills?*
> *Yes No*
> *Demonstrates impulsive thinking and/or behaviour?*
> *Yes No*
> *Uses inappropriate problem solving strategies?*
> *Yes No*
> *Has difficulty understanding other people's points of view?*
> *Yes No*
> *If 'yes' to any of above please provide details*[98]

l. What the impact of custody would be on the offender (and family)

[97] Draft Legal Aid Policy, Civil Society Organizations have created a network of more than 1300 community based paralegals, p.10
[98] PC12/2007 – Pre-Sentence Report Decision Tool, National Probation Service of England & Wales, June 2007

m. Sentencing options and proposal.[99]

6.2.2. Who?

It would be the role of probation officers to conduct the pre-sentence assessment in order to complete the pre-sentence report presented to the judge for sentencing purposes. Probation officers could be assisted in this role by the grass root paralegal(s) that live in the same area with the concerned person(s).

6.3. Conclusion

Improved sentencing information for judges goes hand in hand with the introduction of a probation system. This would be an incredible step forward for justice in Rwanda as judges would be better informed and better able to impose the appropriate sentence. It would also increase the use of non-custodial sentences which are currently under-utilized in Rwanda.

7. IMPROVE DOCUMENT MANAGEMENT AND COMMUNICATION SYSTEM BETWEEN COURTS, RCS AND POLICE COURTS

Communication failures and poor management of files may lead to violation of tigistes' rights. It should be the responsibility of RCS to verify and make sure that before the offender commences the TIG sentence his/her file is complete with all the necessary documents available, to facilitate his/her release at the completion of TIG sentence. An electronic record keeping and management system should be put in place, at all levels, to facilitate the process. Further, strong communication channels between the courts, RCS, prison and the police are essential to ensure that the process operates smoothly and that nobody is lost within the system.

7.1. Current situation of *tigistes* files

There are currently many problems related to unavailability of court, prison, or police detention records for *tigistes*. Interviews with *tigistes* revealed that a number of them have incomplete files[100]. Some were missing copies of their judgments, necessary forms releasing them from prison to TIG and/or records testifying their TIG hours performed in neighbourhood TIG before moving to camp TIG. There are, moreover, *tigistes* who joined TIG from prison but do not have copies of detention orders certifying the number of days/months spent in prison and this results in spending longer period in TIG camps than required. Some of these problems emanate from lack of effective record keeping system as well as poor communication system among different actors involved in TIG process (courts, prison authorities, police and local authorities). As an example, below is a table showing file problems in the Nyanza TIG camp.

[99] PC12/2007 – Pre-Sentence Report Decision Tool, National Probation Service of England & Wales, June 2007 these factors are taken from the specimen pre-sentence report forming part of this probation circular.
[100] This information of incomplete files and the problems related to were also confirmed by the supervisors/coordinators of Nyanza, Huye and Nyarugenge TIG camps.

***Tigistes* with incomplete files in Nyanza camp[101]:**

Status	Number of *tigistes*
Hours performed in Neighborhood TIG, before joining camp, were not recorded (not available)	**21**
Have no detention order and prison release order to show the date he/she was arrested/detained, the date he/she was released from prison and hence the time he/she spent there	**18**
Don't have judgment copies to testify his/her total sentence period	**25**
Claim that they have finished their sentence but have no proof and so they are still being held in camps performing "extra" hours	**5**

Given the total number of *tigistes* in Nyanza TIG camp which stood at 169 as of 15/12/2012, the figures in the table above imply that 40% (69 *tigistes*) of the total population of the Nyanza TIG camp has problems related to incomplete files (missing documents in their files). These figures show how serious the problem is, and most importantly the effect it is having on *tigistes* such as the 5 *tigistes* being held "in excess" of the period they ought to have spent in TIG. This problem of the *tigistes* claiming that they completed their TIG sentence also came up in our interview with the coordinator of Huye TIG camp who told us that, at that time, there were 12 *tigistes* claiming that their TIG sentence had been completed almost a year previously.[102] One could argue that these 17 *tigistes,* being held "in excess" of the period they ought to be in TIG, are lying. That might be so, but anecdotal evidence from other reports show that violations of a detainee/prisoner's right to freedom do occur in Rwanda due to communication failures within the criminal justice system.

A clear example of the grave violation of a detainee's right to freedom due to communication failure is contained in the Legal Aid Forum survey report on pre-trial justice in Rwanda; the detainee was coded number 129:

- He was 15 years old;
- Arrested on 14th April 2009;
- Accused of rape;
- Order for preventive detention made on 22nd April 2009;
- Tried in absentia on 12th January 2010 and acquitted but only released from prison on 29th May 2012 due to the communication failure. The court said that they duly summoned the accused but neither the prison authorities, holding the accused (coded here number 129), nor the accused knew about the trial. To make it worse, after delivering its decision, the court did not submit the judgment copy to the prison authorities and so number 129 remained in prison "awaiting" trial when actually he had already been tried and acquitted two years previously. This example shows a clear communication failure within Rwanda's criminal justice system which can affect individuals' (detainees/prisoners) rights to freedom/liberty.

[101] Interview with Nyanza TIG camp coordinator on 15/12/2012.
[102] Interview with the Huye TIG camp coordinator on 15/12/2012.

To avoid the occurrence of such incidences within TIG, RCS should take responsibility to make sure that each *tigiste's* file is complete at the beginning of the execution of his/her TIG sentence. As a backup, each *tigiste* should be provided with the copy of his/her complete file at the beginning of executing TIG sentence.

7.2. How to deal with the current files problems

The Law terminating Gacaca courts provides that a person who needs a copy of their judgement (that can no longer be found) has to request the Public Prosecution at the Primary level to recollect the information for the reconstruction of the file which is then submitted to the Primary Court in order to reconstitute the decision.[103] The number of *tigistes* without copies of judgment can be reduced by making use of this provision. However, given the difficulty for *tigistes* with regard to getting time[104] and transport coupled with the lack/limited education for most of them it is very difficult for them to initiate and follow up this complex and long process of retrieving a copy of the judgment. Therefore, as an immediate and urgent solution, RCS authorities should take responsibility and draw up a comprehensive list of all *tigistes* (both in camps and working in the neighbourhood) with incomplete files and then work with the prosecution and courts to obtain these missing documents.

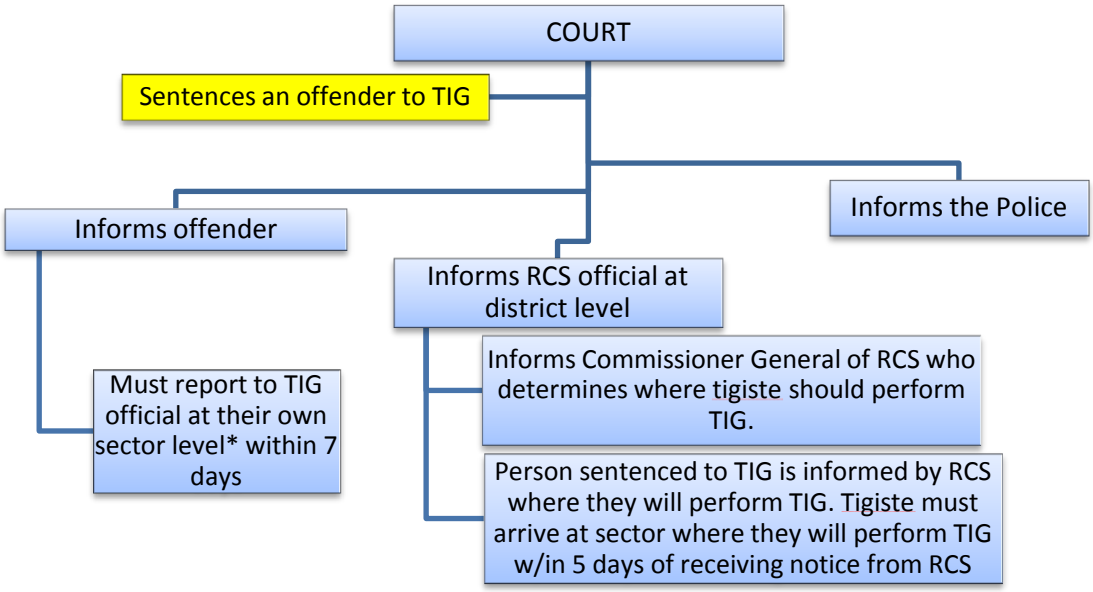
7.3. Set up strong communication system between courts, RCS, police and local authorities

In a bid to avoid such files problems in the future, the new Presidential Order[105], in its article 13, provides for the exchange of documents between the Courts, Rwanda Correctional Services and the Police. However, article 13 omits to mention the exchange of documents between the prison and TIG authorities in cases where the offender first serves half of the sentence in prison. Although we understand that both these roles (prisons and TIG) are performed by RCS, there is a separate department in charge of TIG and another one in charge of prisons and so there is a requirement to establish clear communication channels between these departments. There is a need for a stronger system of communication among all involved actors.

7.4. Proposed system of communication that can be put in place

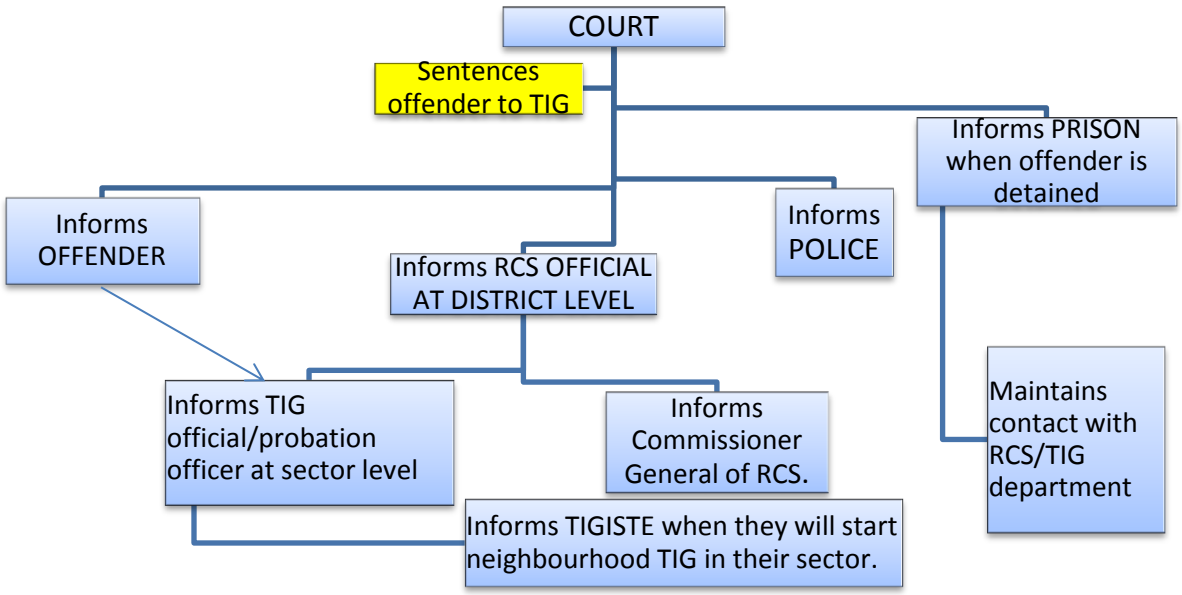
The chart below sets out the current communication channels pursuant to the Presidential Order:

[103] Art. 20 of the Organic Law N° 04/2012/OL of 15/06/2012 terminating Gacaca Courts and determining mechanisms for solving issues which were under their jurisdiction, *O.G* Special N° of 15/06/2012.
[104] During our interviews with *tigistes* they told us that even those who are given permission to go and look for those documents (judgment copy, detention order etc) the permission is usually for a very short period and so most come back without achieving anything hence leading to their "overstaying" in TIG till the time the missing document will be obtained.
[105] Presidential Order no 66/01 of 02/11/2012 determining the modalities of implementation of community service as an alternative penalty to imprisonment



As seen above, the *tigiste* under the current model has to report to their own sector within 7 days of being sentenced to TIG and then again to the site where they are to carry out the works, usually a different sector, within 5 days of receiving notification of the location of TIG.

The chart below sets out a more effective communication model favouring neighbourhood TIG which includes the prisons in the communication network and reduces the administrative burden on RCS:



To facilitate the communication between the courts and RCS an electronic information sharing system could be set up between the courts and RCS specifically in relation to sentences of TIG. Under such a system a court clerk enters the details of the court judgment (sentencing an offender to TIG) into an automated system and the RCS coordinator at the relevant district immediately

receives the information. This would also be in line with the current government policy of using digital/electronic document storage and reduce the use of paper[106].

8. LEGISLATIVE REFORM

In order to embrace a working system of non-custodial alternatives various legislative reforms are necessary. The below section discusses proposed revisions to the Presidential Order N°66/01 of 02/11/2012 determining the Modalities of Implementation of Community Service as an Alternative Penalty to Imprisonment (hereinafter, the "Presidential Order") and the Penal Code.

Presidential Order

The Presidential Order was introduced further to the new Penal Code extending the sentence of TIG to non-genocide related crimes. The Presidential Order does not go far enough to address all the gaps in implementation of TIG.

Certain gaps that are not addressed in the Presidential Order are as follows:

- Provisions for minors, stating categorically that they are not eligible to carry out TIG;
- Factors that RCS should consider when deciding where a tigiste should carry out TIG;
- Whether an offender will serve a term of imprisonment before or after carrying out TIG;
- Communication channels between prisons and RCS/TIG department;
- The tendering process for organizations that want to use *tigistes*;
- The standard of accommodation for *tigistes* in the TIG camps; and
- The exact hours that are worked each week and how many hours constitute a year.

Beyond the gaps set out above, the main critique of the Presidential Order relates to Article 2 which lists those eligible for TIG. Subsection 4 of the same article states that a person is eligible for TIG where he/she has been:

'*convicted to pay a fine, Court fees or to effect any payment into the Public Treasury, restitution or pay damages for the benefit of the party to* ***civil case*** *when he/she has failed to comply with the judgment imposed against him/her by the court,*'

This provision raises serious concerns. This indicates that in civil proceedings an offender can be released from his/her obligation to pay an award for damages if he/she carries out TIG. This would contravene an individual's right to justice as the state would benefit where it has not been wronged and the victim should instead be compensated. Paragraph 3 of Article 48 of the Penal Code states conversely that:

'When a convicted person has completed community service as alternative penalty to imprisonment, he/she shall not be relieved of other obligations imposed by the Court.'

[106] http://www.newtimes.co.rw/news/index.php?i=15287&a=64548, accessed on 05/03/2013.

The above provision of the Penal Code implies that serving a term of TIG releases an offender from their obligation to pay damages. If an offender is unable to pay damages there must be another solution than forcing him/her to perform TIG and the victim not receiving any compensation.

Ibuka reiterates the above point in their position paper of September 2012[107]:

> *'2. The right of individuals to claim and be awarded compensation … should not be infringed upon or curtailed by the state, in that the issue of private property is specific to private parties and civil matters. The state should not benefit from TIG executed for such cases, and in so doing jeopardize the victim's chance, and indeed right, to receive reparation in the form of either restitution or compensation now or in the future.' (p.3)*

In Ibuka's position paper they recommend that a daily 'wage' of a *tigiste* be identified and suggest a value of RwF 1,000 per day. Such a 'wage' would allow the State to pay reparation to those genocide victims unable to obtain compensation when the individual is insolvent and as a result carries out TIG for the benefit of the State. This should be extended to cover all victims, especially those to a civil case, in order to compensate the victims. This way the offender is in effect working to pay off his debts, but for the State rather than directly for the victim. *Tigistes* interviewed in Karongi for the most part preferred the option of working for the State rather than directly for the victim as they were working for the national good and it avoided conflicts that might arise between the parties and hence derail their reconciliation efforts.

During our field work, we were informed that a daily wage is calculated for each *tigiste* depending on the particular project that they are working on. The value is used to calculate the productivity of each TIG camp. For the *tigistes* working on roads in Nyanza, the wage was equivalent to RwF 2,000 per day (approximately USD$3.20) and for those *tigistes* making paving stones in Huye the rate was RwF 1,500 per day (approximately USD$2.40).[108]

A daily wage should be codified and form the basis of reparation to parties to a civil case where the defendant is carrying out TIG as a result of an inability to pay damages. The Penal Code should then be amended to reflect the fact that those *tigistes* who carry out TIG due to an inability to pay damages are released from their obligation to pay the victim upon release.

Further concerns in relation to the Presidential Order include its silence regarding situations where the offender sentenced to TIG is in prison. If an offender is in prison, they would not be able to report to the sector level within seven days of the date of sentence unless the prison has been informed of the situation. The Presidential Order does not set out a communication structure between the TIG department within RCS, the courts and the prisons. This will cause problems where an offender sentenced to TIG performs half their sentence in prison first.

Penal Code:

[107] IBUKA, Submission on the Draft Presidential Order Determining the Modalities of Implementation of Community Service as an Alternative Penalty to Imprisonment, September 2012.

[108] Interviews with the Nyanza and Huye TIG Camps coordinators.

The new Penal Code increases the use of alternatives, however further reform of certain provisions is recommended to fully embrace non-custodial sentencing.

Article 47 of the Penal Code states:

> *'When an offence is punishable by a term of imprisonment of six (6) months to five (5) years, the Court may order that the convict serve half (1/2) of the term of his/her sentence in performing community service as alternative penalty to imprisonment.'*

If one of the aims of community service is to decongest prisons, the above provision only serves to achieve this in part. The above provision should be amended to give judges the discretion to order a full sentence of community service rather than a hybrid sentence as set out above. Community service should be a standalone sentence for offenders who receive sentences longer than the current six month maximum. Guidelines and training can be provided to judges to assist them in the exercise of this discretion. The non-genocide offender who was interviewed while serving TIG in Nyarugenge committed the crime of assault and received a sentence of RWF 100,000 which he was unable to pay. Due to his inability to pay the fine he served 18 days in prison and a further 3 months performing TIG. This is a classic example of (a) an individual who could have just served a sentence of TIG rather than congesting the prisons and serving a hybrid sentence; and (b) an individual who could have benefited from a system of day-fines so that his inability to pay a large fine did not result in imprisonment.

It is also unclear from either the Penal Code or the Presidential Order how these hybrid sentences will be implemented. Will offenders first serve half their term in prison then be released to complete community service or the other way round? The modalities for how this will work in practise are unclear. These hybrid sentences originally also applied to genocidaires sentenced to TIG who first served half their sentence in prison, however, in 2008, parliament amended the gacaca law to require individuals sentenced to prison and community service to serve the community service portion of the sentence first, with the possibility of having the remainder of the sentence suspended if the person satisfactorily completed the TIG program[109]. It is unclear whether this will be the case under the new Penal Code for all offenders and legislative clarity is needed on this point.

Further legislative reform would also be necessary to implement the other recommendations set out in this report.

9. TRAINING ON USE OF ALTERNATIVES AMONGST POLICE, PROSECUTION, LAWYERS AND JUDICIARY

It is essential to increase awareness and understanding amongst the judiciary through in-depth training on the use of alternatives to imprisonment. The justification for punishment needs to be discussed with judges in order for them to understand why alternatives are important. Since the new Penal Code, which expanded the use of non-custodial sentences, there has been very little change in the number of offenders actually sentenced to TIG. Training will assist to remedy this

[109] 2008 Gacaca law, art.21.

situation. It is essential that all players in the criminal justice system including prosecutors, police, lawyers and the judiciary receive this training. Training of lawyers falls within the remit of the Kigali Bar Association.

9.1. Current use of alternatives by judiciary

The use of community service as a non-custodial sentence has been very infrequent since the promulgation of the new Penal Code. Since the new Penal Code only 24 non-genocide offenders have been sentenced to TIG.

Number	TIG CAMP
18	Rusizi
4	Rubavu
1	Gakenke
1	Ruhango
1	Nyarugenge

In the course of this research the one *tigiste* in Kigali who was a non-genocide offender was interviewed.

The fact that there have been so few non-genocide offenders who have performed TIG since the new Penal Code implies that there is a reticence amongst the judiciary to fully utilize non-custodial sentences. This was echoed in the interviews with judges, many of whom were not yet aware that the Presidential Order had been passed. All of the judges interviewed thought that the extension of TIG to non-genocide offenders was a good development and thought that TIG contributed towards national development. However, none of the judges interviewed had sentenced any non-genocide offender to TIG. Furthermore, all of them said that they would like to receive further training on the use of alternatives.

The main reasons given by the judges for their reticence to use alternatives to imprisonment were:

- They would be seen as being soft on crime.
- They do not fully understand how the system will work in practise;
- They weren't aware that the Presidential Order had come into force.

The above reasons indicate the urgent need for training on this subject amongst judges. The introduction of alternatives on paper has to translate to offenders carrying out non-custodial sentences in practise. RCS also needs to communicate better with each of the courts to inform them on the practicalities of sentencing an individual to TIG.

9.2. Content of training

Training should broadly encapsulate the following topics:

1. <u>The purpose of alternatives</u>: this would provide the participants with background on sentencing theory used to justify punishment. These theories include:

a. **Retributivism or just deserts**: The theory of retributivism justifies punishing a person for harms done on the basis of 'just deserts', in other words the offender deserves to be punished for the crime committed. This theory links the punishment directly with the seriousness of the crime and there is no exterior motive such as deterrence or protection of society at large[110].
b. **Utilitarian:** According to the utilitarian, the rationale of punishment is to prevent further crime by either reforming the criminal or protecting society from him and to deter others from crime through fear of punishment. The approaches of deterrence and rehabilitation fall into this theory.
c. **Incapacitation:** This is the theory that you lock people up in order to incapacitate them. This aims to eradicate the threat that the individual poses to the society as a whole.
d. **Reparation:** This focusses on the victim of the crime and the community and ways in which the offender can restore the harm done.
e. Discussion on which of these theories best describes the Rwandan system as a basis to develop an understanding of the use of alternatives.

2. Alternatives in Rwanda
    a. Training on the laws governing the use of alternatives in Rwanda, primarily the Penal Code and the Presidential Order.
    b. Explain the differences between neighbourhood TIG and camp TIG – site visits would be valuable to understand this in practise.
3. Guidance for judges on exercising their discretion when sentencing an offender to TIG
    a. Sentencing information for judges: introduction to the most important factors that should be identified in order to assist judges in exercising their discretion.
    b. Discussion of mitigating and aggravating factors
4. Use of diversion schemes
    a. The way that diversion schemes work – history on their use and development in other countries.
    b. Way to identify appropriate candidates who should be eligible for diversion schemes
5. Probation service
    a. Training on function of a probation service – explore its use in other countries.
    b. Training on factors that are most important when considering imposing a probation order.

This training would equip those involved in the criminal justice system to fully understand the use of non-custodial sentences.

A manual should also be introduced for judges on the use of different alternatives and guidelines developed to assist judges in exercising their discretion.

[110] Lexis Nexus, Theory, Sources, and Limitations of Criminal Law, http://www.lexisnexis.com/lawschool/study/outlines/html/crim/crim01.htm

CONCLUSION

Although the Penal Code allows for the mainstreaming of TIG to non-genocide offenders and also provides for the use of fines and suspended sentences as non-custodial sentences, further attention is needed to ensure that these alternatives are effectively used in practise.

The mainstreaming of TIG requires an analysis of the objectives of TIG and whether TIG carried out in camps is a proportionate punishment for lesser crimes. It is arguable that TIG carried out in camps is not an alternative to imprisonment, but is instead a form of imprisonment under a different mask. Neighbourhood TIG should be prioritised because it is more proportionate, more cost effective, and also because it is in line with international standards on community service as an alternative to imprisonment. The sentence of TIG for ordinary offenders is being used very infrequently by judges. Further training and sensitization is necessary to encourage the judiciary to fully utilize the non-custodial sentences available to them including fines and suspended sentences. In tandem with this training, further guidance is needed for judges to assist them in exercising their discretion when carrying out sentencing.

Pre-sentence reports prepared by trained probation officers should be introduced. Probation does not currently exist in Rwanda, but should be introduced for offenders who have committed minor offences to further reduce the burden on prisons. If a system of probation is introduced in tandem with the expansion of neighbourhood TIG the TIG co-ordinators at the sector level could also serve as probation officers following detailed training.

Alternatives should be prioritized for minors who, as far as possible, should be kept out of the formal prison system. Diversion schemes for minors, successful in many countries around the world, should be introduced in Rwanda to deal with minors who have committed petty crimes. This would not only serve to reduce prison overcrowding, but would also reduce recidivism in the future and promote offender rehabilitation.

Community mobilization is also needed to embrace the idea of alternatives to imprisonment and to promote the mind-set that imprisonment is not the only viable punishment available for judges and that deprivation of liberty should only be imposed as a last resort.

Willingness exists for the changes detailed in this report to be implemented. Through collaboration between all the principal players within the justice sector, a strong system of alternatives to imprisonment can be maintained which will serve to strengthen Rwanda's justice system. Rule of law has been defined as "*An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay;* ***a rational and proportionate approach to punishment****; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law….The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect."*[111] Putting in place a strong framework for proportionate alternative punishments which are respected and adhered to in Rwanda will therefore strengthen the rule of law in Rwanda.

[111] Resolution of the Council of the International Bar Association of October 8, 2009, on the Commentary on Rule of Law Resolution (2005)

APPENDIX 1 - TERMS OF REFERENCE

Terms of Reference for a study of alternatives to imprisonment in Rwanda focusing on the mainstreaming of TIG (Travaux d'Intérêts Général) and best practice guidelines for judges in the exercise of their discretion when imposing non-custodial sentences

1. Background and Context

Rwanda Correctional Service, a national service with administrative and financial autonomy[112] faces significant challenges. The total prison population stands at 56,730 (as of 30th September 2012) against the jail capacity of 54,000. Of the 56,730 inmates about 4,584 are on remand (awaiting trial)[113].Although there has been much improvement, this has led to overstretching and pressure on the limited facilities provided in the prisons which have further led to poor delivery of services. The prison population skyrocketed in July 2007 to approximately 98,000 due to Gacaca trials but the release program of Genocide offenders through TIG resulted in a significant decongestion of prisons. Despite the release program, Rwanda's prisons are operating at about 5.3% over designed capacity[114], with resultant poor conditions for inmates. The new penal code extends the imposition of community service (TIG) as an alternative to imprisonment beyond genocide offenders. Under the new penal code those who have committed an offence which is punishable by a term of imprisonment of between 6 months and 5 years may be sentenced to community service for half of their prison term. Furthermore, where offenders face a sentence of six months or less the court can order that they carry out community service as an alternative to imprisonment. This introduction will serve to further decongest prisons.

2. Overall Objective

To conduct an objective, in-depth, qualitative study on the mainstreaming of TIG and other non-custodial sentences to new offences, as allowed for by the new Penal Code, with a specific focus on the manner in which the court exercises its discretion.

3. Specific objectives

3.1. To examine the use of non-custodial sentencing in the international context, with specific emphasis on Sub Sahara Africa.

3.2. To assess the nature of TIG as an alternative to imprisonment in Rwanda and identify further cost effective non-custodial sentencing options that could be introduced/extended in Rwanda.

3.3. To find out what factors the court takes into account when exercising its discretion to impose a non-custodial sentence and to make recommendations on the use of that discretion.

3.4. To examine existing laws governing the imposition of non-custodial sentences in Rwanda

[112] Law Law no 34/2010 of 12/11/2010 on the Establishment, Functioning and Organization of Rwanda Correctional Service
[113] RCS, Activity report quarter I - 2012/2013.
[114] *Idem*.

3.5. To find out how the judiciary currently makes use of non-custodial sentencing options.

3.6. To examine international guidance in relation to the imposition of alternatives to imprisonment, with a specific emphasis on Sub Sahara Africa.

3.7. To explore the development of judicial guidance that could be used in Rwanda to assist judges in the exercise of their discretion when imposing non-custodial sentences.

3.8. To explore the relationship if any, between the use and or non-use of non-custodial sentencing to prison congestion.

3.9. To find out the relative cost of custodial to non-custodial sentencing

4. Expected results

During the assignment, the consultants are expected to deliver the following:

4.1. Carry out a literature review on the use and success of alternatives to imprisonment in selected countries, with a focus on Africa, and describe the benefits, and reasons for their selection.

4.2. Review the existing legislation/provisions on non-custodial sentencing in Rwanda, identify the gaps (if any), and propose strategies for improvement, and reinforcement.

4.3. Carry out an in-depth analysis of the TIG with a view to how mainstreaming will work in practice, the future of TIG and the problems that it may face with the expansion of community service sentencing under the new Penal Code.

4.4. Identify other possible cost effective alternatives to imprisonment and ways in which they could be introduced in Rwanda.

4.5. Assess the ways in which non-custodial sentencing are currently used in Rwanda and the factors that courts take into account when exercising their discretion to impose community service sentences.

4.6. Conduct a comparative analysis of sentencing policies and guidance in selected countries, with a focus on Africa, with a view to developing best practice guidelines (for judges in the exercise of their discretion when imposing non-custodial sentences) that could be introduced in Rwanda and form the basis of training for judges and magistrates.

5. Specific Tasks of the Consultancy Team

5.1. To prepare a detailed offer including itemised costing for all the activities to execute the study.

5.2. To prepare a detailed analysis of the collected information on all alternatives to imprisonment.

5.3. To prepare a draft report with the findings of the study to be presented to the JRLOS Thematic Working Group No 2 on Monitoring and Evaluation in a joint meeting with the TWG 4/5 on Access to Justice, Safety and Security. Incorporate comments and amendments.

5.4. To submit a final draft report to the JRLO Sector Secretariat, to which the Secretariat will respond within 6 days.

5.5. To submit a final report (three hard copies and soft copy) to the Permanent Secretary of the Ministry of Justice.

6. Duration

The study will be concluded by March 2013.The duration of the consultancy will be approximately 30 working days for the lead, and the national consultant. This includes the time for studying the documentation and preparation of the methodology. It also includes the time for report writing and presentation. An additional three (3) working days for the redaction of the final report is expected.

7. Reporting

The consultant(s) will regularly report on progress to the Coordinator and the Chief Technical Advisor of the JRLOS Secretariat. The JRLOS Secretariat will assist the consultant(s) with providing essential documents regarding the Justice Sector and Strategy.

APPENDIX 2 - FACTORS TO BE CONSIDERED FOR AND AGAINST DIVERSION[115]

3.1. The following factors in a case should be considered by the Public Prosecutor in favour of prosecution and against diversion:

i. The seriousness of the offence i.e. where a conviction is likely to result in a significant penalty including any confiscation order or disqualification;
ii. Where the offender was in a position of authority or trust and the offence is an abuse of that position;
iii. Where the offender was a ring-leader or an organiser of the offence;
iv. Where the offence was pre-meditated;
v. Where the offence was carried out by a group;
vi. Where the offence was carried out pursuant to a plan in pursuit of organised crime;
vii. Where the offence involved the possession or use of a firearm, imitation firearm or other weapon such as a knife;
viii. Where the offence was motivated by hostility against a person because of their race, ethnicity, sexual orientation, disability, religion, political beliefs, age or the like;
ix. Where the offence is prevalent;
x. Where the offence has resulted in serious financial loss to the individual, corporate person or society;
xi. Where the offence was committed against a person serving the public, for example a doctor, nurse, member of the ambulance service, member of the fire service or a member of the police service;
xii. Where the victim of the offence or their family has been put in fear or suffered personal attack, damage or disturbance. The more vulnerable the victim the greater the aggravation;
xiii. Where there is a marked difference between the actual or mental ages of the offender and the victim, and the offender took advantage of this;
xiv. Where there is any element of corruption;
xv. Where the offender has previous convictions or diversionary disposals which are relevant;
xvi. Where the offender is alleged to have committed the offence whilst on bail, on probation, or subject to a suspended sentence or an order binding the offender over to keep the peace, or released on licence from a prison or a place of detention, or otherwise subject to a court order;
xvii. Where there are grounds for believing that the offence is likely to be continued or repeated, for example where there is a history of recurring conduct.

3.2. The following factors should be considered by the Public Prosecutor in favour of diversion and against prosecution:

i. Where the court is likely to impose a very small or nominal penalty or sentence;
ii. Where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgment or a genuine mistake;
iii. Where the offence is not of a serious nature and is unlikely to be repeated;

[115] Extract from *Guidelines for Diversion*, Public Prosecution Service, Belfast, published November 2008, p.9-10

iv. Where there has been a long passage of time between an offence taking place and the likely date of trial unless:
    a. the offence is serious;
    b. delay has been caused in part by the offender;
    c. the offence has only recently come to light; or
    d. the complexity of the offence has resulted in a lengthy investigation;
v. Where prosecution is likely to have a detrimental effect on the physical or mental health of a victim or witness, particularly where they have been put in fear;
vi. Where the offender is elderly or where the offender is a child or young person;
vii. Where the offender was at the time of the offence or trial suffering from significant mental or physical ill health;
viii. Where the offender has put right the loss or harm that was caused (although offenders must not be able to avoid prosecution simply because they pay compensation).

APPENDIX 3 – LIST OF STAKEHOLDERS

STAKEHOLDERS DIRECTLY ASSOCIATED WITH THIS POLICY

No.	INSTITUTION/ORGANIZATION
Public institutions/JRLO Sector	
1.	Ministry of Justice-MINIJUST (MAJ, Abunzi Secretariat, JRLOS Secretariat)
2.	Ministry of Internal Security (MININTER)
3.	Rwanda Correctional Services (RCS)
4.	Supreme Court
5.	National Public Prosecution Authority (NPPA)
6.	Rwanda National Police (RNP)
7.	National Law Reform Commission (NLRC)
8.	Institute of Legal Practice and Development (ILPD)
9.	National Human Rights Commission (NHRC)
Public institutions/Not members of JRLOS	
1.	Ministry of Gender and Family Promotion (MIGEPROF)
2.	National Children Commission (NCC)
3.	Ministry of Local Government and Social Welfare (MINALOC)-Local administration
Civil society organizations/Professional bodies	
1.	Kigali Bar Association (KBA)
2.	The Legal Aid Forum (LAF)
3.	Haguruka
4.	The Youth Association for Human Rights Promotion and Development (AJPRODHO)
UN Agency/International organizations working in Rwanda	
1.	United Nations Children's Fund (UNICEF)
2.	International Justice Mission (IJM)
3.	Save the Children

APPENDIX 4 – IMPLEMENTATION PLAN

EXPECTED OUTPUTS (indicators including annual targets)	ACTIVITIES RESULT		TIMEFRAME			RESPONSIBLE
			2013 - 2014	2014 - 2015	2015 - 2016	
Output 1: Development of system of proportionate alternatives to imprisonment, with a specific focus on minors to strengthen justice and rule of law in Rwanda. **Indicators** • % decrease in number of children in detention • % decrease of prison population overall due to successful use of alternatives • % increase in number of minors being given alternative sentences • % increase in number of diversion schemes set up to deal with minors in conflict with the law • Increase use of neighbourhood TIG across more districts. • % decrease in number of inmates in TIG camps • Decommissioning of TIG camps	Activity 1.1: Introduce (PILOT) probation system for minors in Rwanda					
	1.1.1	Legislative reform to allow for probation orders to be awarded by the courts and to set out framework for operation of probation system	x			MINIJUST, NLRC
	1.1.2	Train judges and prosecutors on use and purpose of probation orders.	x	x	x	Supreme Court, ILPD, NPPA
	1.1.3	Training of National Children's Commission's (NCC) district level social workers and district officer in charge of gender, family promotion and child's rights on probation.	x	x	x	NCC - MIGEPROF, RCS, ILPD
	1.1.4	Recruit and train probation officers to supervise offenders on probation.	x	x		RCS, ILPD
	1.1.5	Set up reporting structure whereby probation officers report to NCC social workers, district officer in charge of gender, family promotion and child's rights and RCS co-ordinator at the district level. NCC social workers to report to the district officer in charge of gender, family promotion and child's rights who then reports to MINALOC and MINIJUST. Reporting structure from the grassroots level up established.	x	x	x	NCC, MINALOC, RCS
	1.1.6	Strengthen District level Justice Committees - giving them child justice as a specific competency.	x	x	x	MINIJUST, MINALOC, RCS
	Activity 1.2: Introduce (PILOT) diversion schemes					
	1.2.1	Legislative reform to allow prosecutors to divert minors to diversion schemes when appropriate.	x			MINIJUST, NLRC

once genocide perpetrators have gone through (long term output) • % decrease in rates of recidivism amongst minors	1.2.2	Training of police and prosecutors on use of diversion schemes	x	x	x	NPPA, ILPD, RNP
	1.2.3	Training of NCC district level social workers on diversion schemes	x	x	x	NCC - MIGEPROF, MINALOC, ILPD
	1.2.4	Probation officers given wider powers to manage at the local level the diversion schemes - liaising with the NCC social workers, the RCS co-ordinator at the district level and the district officer in charge of gender, family promotion and child's rights and civil society organizations at a grassroots level	x			MINIJUST
	1.2.4	If the Abunzi are used to mediate diversion schemes, their competences to be revised to enable Abunzi to deal with issues relating to minors.	x			MINIJUST
	1.2.5	If Abunzi are used to mediate diversion schemes, training of Abunzi on diversion schemes and their mediatory role.	x	x	x	MINIJUST (MAJ), ILPD/civil societies
	1.2.5	Grass roots diversion schemes set up such as mediation schemes, re-education schemes, work placement schemes, counselling schemes, etc	x	x	x	District level justice committees, Local authorities, Civil societies
	1.2.6	Encourage and sensitize judicial police and prosecutors to increase the use *amende transactionnelle* (fine), as a diversionary measure, where appropriate.				NPPA, RNP, ILPD
	1.2.7	Sensitization campaigns at the local level on the value of diversion schemes for minors as a way of giving a child a second chance	x	x	x	MIGEPROF, MINIJUST (MAJ), MINALOC (Local authorities), CSOs
	1.2.8	Reporting system put in place to oversee diversion scheme operations – from grass roots level to district	x	x	x	RCS, NPPA

		level – probation officers to monitor local diversion schemes and report to NCC social workers in relation to minors and for all other cases to RCS district co-ordinator. RCS co-ordinator or NCC social workers to report to head of prosecution at primary level.				
	Activity 1.3: Prioritise neighbourhood TIG over camp TIG for non-genocide offenders					
	1.3.1	Sensitization campaigns at the local level on the value of community service as a viable alternative to prison.	x	x	x	RCS, MINIJUST, MINALOC, CSOs
	1.3.2	Recruit additional TIG co-ordinators at the sector levels to manage neighbourhood TIG projects (These responsibilities could be shared with probation officers for efficiency)	x			RCS
	1.3.3.	Strong communication channels developed between the courts, RCS, and local government - Prisons and courts to provide reports to TIG RCS co-ordinator at the district level of details of new *tigistes* - RCS co-ordinator to inform local government at the sector and cell level of identity of *tigistes* - List of neighbourhood *tigistes* to be maintained at each district. - Local government to decide on community service projects on a sector basis and inform RCS. - RCS to appoint a co-ordinator at each sector to oversee worksites (could be another role for probation officers)	x	x	x	Supreme court (Courts), RCS, MINALOC (local authorities)
	1.3.4	Additional training for RCS co-ordinator at the district level on management of neighbourhood community service.	x	x	x	RCS
	1.3.5	RCS and Police direction to introduce a three stage warning system for RCS and police to use to deal with absenteeism.	x			RNP, RCS

	1.3.6	Consolidate TIG camps and eventually decommission them upon completion of community service by all genocide perpetrators (long term).		x	x	RCS, MININTER, MINIJUST, Local government
	1.3.7	Strong monitoring and evaluation systems set up to ensure smooth operation and success of alternatives to imprisonment.	x	x		MININTER, RCS, MINIJUST, MINALOC, RNP, NHRC
Output 2: Increase use of existing alternatives. **Indicators** • % increase of number of standalone fines • Application of day fines in Rwandan court system • % increase in suspended sentences for minor crimes Pre-sentencing assessments taking place in Rwandan courts	Activity 2.1: Increase use of fines					
	2.1.1	Legislative reform to introduce the system of day fines.	x			MINIIJUST, NLRC
	2.1.2	Training for the judiciary on use of day fines	x	x	x	Supreme Court, ILPD
	Activity 2.2: Increase use of suspended sentences					
	2.2.1	Introduction of sentencing guidance on how to use suspended sentences.	x			Supreme court
	2.2.2	Training for the judiciary on expanding the use of suspended sentences and using the sentencing guidance to assist them in exercising their discretion.	x	x	x	Supreme Court, ILPD
	Activity 2.3: Improve sentencing information available to judges					
	2.3.1	Legislative reform to allow for pre-assessment reports by probation officers to assist judges in exercising their discretion when sentencing, especially where an alternative to imprisonment is appropriate.	x			MINIJUST, Supreme court
	2.3.1	Pro forma form for probation officers to use for pre-sentencing assessment reports developed	x			NPPA, Supreme Court, ILPD
	2.3.2	Train probation officers and paralegals on conducting pre-sentencing assessments	x	x		Supreme court, ILPD, CSOs
	2.3.3	Train judges on pre-sentencing assessment reports	x	x	x	Supreme court, ILPD
Output 3: improve document management and communication channels	Activity 3.1: Increase efficiency in communication channels where offenders are sentenced to TIG.					
	2.1.1	Amend presidential order on modalities of TIG to streamline communication process and move towards	x			MINJUST, RCS, NPPA

Indicators: • % decrease in number of *tigistes* in camps with incomplete files • Increased communication within RCS between TIG department and prison department. • Improved communication between courts, NPPA and RCS		neighbourhood TIG for non-genocide offenders. - introduce communication channels between prisons and RCS co-ordinator in charge of TIG at the relevant district - improve communication channels between courts, NPPA and RCS				
Output 4: increase awareness of use of alternatives among the judiciary **Indicators:** • % increase in use of alternatives to imprisonment	Activity 4.1 Continuous professional education for judges to raise awareness on use of alternatives					
	4.1.1	Introduce manual for judges on different alternatives to imprisonment and develop guidelines on use of alternatives.	x	x		Supreme court, ILPD
	4.1.2	Training sessions for judges to share experiences in use of alternatives and best practises.	x	x	x	Supreme court, ILPD

APPENDIX 5 – PILOT PROBATION SCHEME COSTINGS

Short course for judges and prosecutors

	Days	Number	Cost/day	Total
Trainer	10	1	159,000	1,590,000
Food and Refreshment	14	25	20,000	7,000,000
Accommodation	14	25	30,000	10,500,000
Sub total				*19,090,000*

Short course for District officer in charge of gender, NCC social workers and RCS co-ordinator

	Days	Number	Cost/day	Total
Trainer	10	1	159,000	1,590,000
Food and Refreshment	14	4	20,000	1,120,000
Accommodation	14	4	30,000	1,680,000
Sub total				*4,390,000*

Short course for TIG supervisors

	Days	Number	Cost/day	Total
Trainer	10	1	159,000	1,590,000
Food and Refreshment	14	12	20,000	3,360,000
Accommodation	14	12	30,000	5,040,000
Sub total				*9,990,000*

Salary for for TIG supervisors/probation officers

Number	12
Salary per month per person	80,000
Total salary per month	960,000
Total salary per year	11,520,000

Registers/stationary for TIG supervisors/probation officers

500 000